No. 17-532	
Title:	**Clayvin Herrera, Petitioner** **v.** **Wyoming**
Docketed:	October 10, 2017
Linked with 17A158	
Lower Ct:	District Court of Wyoming, Sheridan County
Case Numbers:	(2016-242)
Decision Date:	April 25, 2017
Discretionary Court Decision Date:	June 6, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Aug 07 2017	Application (17A158) to extend the time to file a petition for a writ of certiorari from September 4, 2017 to October 5, 2017, submitted to Justice Sotomayor.
Aug 09 2017	Application (17A158) granted by Justice Sotomayor extending the time to file until October 5, 2017.
Oct 05 2017	Petition for a writ of certiorari filed. (Response due November 9, 2017)
Oct 12 2017	Blanket Consent filed by Petitioner, Clayvin Herrera
Oct 24 2017	Blanket Consent filed by Respondent, Wyoming
Nov 08 2017	Brief amici curiae of Indian Law Professors filed.
Nov 09 2017	Brief of respondent Wyoming in opposition filed.
Nov 09 2017	Brief amicus curiae of Crow Tribe of Indians filed.
Nov 09 2017	Brief amici curiae of Timothy P. McCleary, et al. filed.
Nov 28 2017	Reply of petitioner Clayvin Herrera filed. **Main Document** **Certificate of Word Count** **Proof of Service**

Nov 29 2017	DISTRIBUTED for Conference of 1/5/2018.
Jan 08 2018	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 22 2018	Brief amicus curiae of United States filed. **Certificate of Word Count** **Main Document**
Jun 05 2018	DISTRIBUTED for Conference of 6/21/2018.
Jun 05 2018	Supplemental brief of respondent Wyoming filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 05 2018	Supplemental brief of petitioner Clayvin Herrera filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 27 2018	DISTRIBUTED for Conference of 6/27/2018.
Jun 28 2018	Petition GRANTED.
Jul 30 2018	Motion for an extension of time to file the opening briefs on the merits filed. **Main Document**
Jul 31 2018	Blanket Consent filed by Petitioner, Clayvin Herrera. **Blanket Consent**
Aug 02 2018	Motion to extend the time to file the opening briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 4, 2018. The time to file respondent's brief on the merits is extended to and including October 22, 2018.
Aug 27 2018	Blanket Consent filed by Respondent, State of Wyoming **Blanket Consent**
Sep 04 2018	Brief of petitioner Clayvin Herrera filed. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Sep 04 2018	Joint appendix filed. **Main Document**
Sep 10 2018	Brief amicus curiae of Eastern Shoshone Tribe filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amici curiae of Indian Law Professors filed.

	Main Document **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amici curiae of Natural Resources Law Professors filed. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amici curiae of Southern Ute Indian Tribe and Ute Mountain Ute Tribe filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amici curiae of National Congress of American Indians, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amici curiae of Pacific and Inland Northwest Treaty Tribes filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amici curiae of Shoshone-Bannock Tribes of the Fort Hall Reservation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amici curiae of Timothy P. McCleary, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amicus curiae of Crow Tribe of Indians filed. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amicus curiae of United States filed. **Proof of Service** **Main Document**
Oct 03 2018	Motion of Clayvin Herrera for an extension of time not accepted for filing. (Corrected motion submitted - October 12, 2018)
Oct 11 2018	Motion for a further extension of time to file respondent's brief on the merits filed. **Main Document**
Oct 12 2018	Motion for a further extension of time to file respondent's brief on the merits granted and the time is extended to and including November 13, 2018.
Nov 13 2018	Brief of respondent Wyoming filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 15 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Nov 20 2018	Brief amici curiae of Wyoming Stock Growers Association, et al. filed.

	Main Document **Other** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	Brief amicus curiae of Association of Fish and Wildlife Agencies filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	Brief amici curiae of Western Association of Fish and Wildlife Agencies, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	Brief amici curiae of States of Nebraska, Kansas, Louisiana, North Dakota, South Dakota, and Texas filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	Brief amici curiae of Citzen Equal Rights Foundation, Mille Lacs Equal Rights Foundation, City of Wakhon, Minnesota filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	Brief amicus curiae of Safari Club International filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 28 2018	SET FOR ARGUMENT ON Tuesday, January 8, 2019
Nov 30 2018	CIRCULATED
Dec 03 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 11 2018	Record requested from U.S.D.C. Wyoming, Sheridan County.
Dec 13 2018	Reply of petitioner Clayvin Herrera filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 27 2018	Record from the District Court Wyoming, Sheridan County received (2 boxes).
Jan 08 2019	Argued. For petitioner: George W. Hicks, Jr., Washington, D. C.; and Frederick Liu, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: John G. Knepper, Chief Deputy Attorney General, Cheyenne, Wyo.

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RECORD AND BRIEFS

17-532

No. _____

In the
Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Petition for Writ of Certiorari to the District Court of Wyoming, Sheridan County

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family.

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PETITION FOR WRIT OF CERTIORARI

This case presents an important question of federal law that has divided the lower courts and affects the livelihoods of thousands of Native Americans. In 1868, the United States and the Crow Tribe of Indians entered into a treaty pursuant to which the Tribe ceded to the federal government the majority of its aboriginal territory but retained a portion for the establishment of the Crow Reservation. To ensure that the Tribe could continue to engage in subsistence hunting on the ceded lands, the treaty provided that the Tribe "shall have the right to hunt on the unoccupied lands of the United States." For well over a century, Crow Tribe members have relied on that binding language to hunt on off-reservation lands, including in the Bighorn National Forest, which is adjacent to the Crow Reservation and was established in 1897 from lands that the Tribe ceded to the United States.

Petitioner Clayvin Herrera is a member of the Crow Tribe. In January 2014, Petitioner and other Tribe members went hunting on the Crow Reservation, which is located in southern Montana and shares Montana's southern border with Wyoming. After spotting a small herd of elk, the group pursued the animals, eventually crossing from the Reservation into the Bighorn National Forest, which is located in northern Wyoming and shares Wyoming's northern border with Montana. The group shot and killed three elk in that federal forest, and carried the meat back to the Reservation to help feed their families and other members of the Tribe over the winter.

Notwithstanding the federal treaty rights reserved to Petitioner and the Crow Tribe, the state of Wyoming convicted Petitioner of two crimes under Wyoming law for unlawfully hunting elk in the Bighorn National Forest. A Wyoming trial court prohibited Petitioner from asserting the treaty right as a bar to prosecution, and a Wyoming appellate court affirmed. Both courts relied exclusively on a 1995 Tenth Circuit decision that concluded that the Tribe's treaty-protected hunting rights were categorically abrogated by Wyoming's 1890 admission to the Union or, alternatively, by the 1897 establishment of the Bighorn National Forest, which ostensibly rendered those lands no longer "unoccupied." The Wyoming Supreme Court denied review.

The judgment below cannot stand. Nothing has abrogated the Tribe's off-reservation hunting rights reserved under the 1868 Treaty. Wyoming's statehood did not terminate the Crow Tribe's rights, because this Court held after the Tenth Circuit's decision that Indian "[t]reaty rights are not impliedly terminated upon statehood." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207 (1999). And as the Ninth Circuit and multiple state supreme courts have held, the establishment of a national forest does not render that land "occupied" so as to abrogate Indian treaties reserving similar rights. Indeed, the federal statute authorizing the creation of federal forests expressly *prohibited* abrogation of Indian treaties. And the 1897 proclamation establishing the Bighorn National Forest precluded "entry or settlement" on the land, which is the very opposite of rendering that land "occupied."

The decision below and the Tenth Circuit decision upon which it relied are both profoundly wrong and in conflict with this Court's precedent and the decisions of numerous other lower courts. Certiorari is thus warranted—and imperative. The answer to the question presented—whether the 1868 Treaty has been abrogated—will determine whether Crow Tribe members, and all other Native Americans subject to treaties with similar language, can exercise long-established rights integral to their identity and well-being. And as this very case makes clear, members of the Tribe, including Petitioner, depend upon their treaty-protected hunting rights to feed their families to this day. If the Tribe's federal treaty rights are to be the "supreme Law of the Land" no more, U.S. Const. art. VI, cl. 2, and a state can criminally prosecute and convict a Tribe member for engaging in what the plain language of the treaty expressly protects, all based on reasoning that other courts have repudiated, then at least this Court should be the one to make that determination. In all events, the need for this Court's review is plain.

OPINIONS BELOW

The order of the Wyoming Supreme Court denying review is unreported but reproduced at App.1-2. The opinion of the Wyoming District Court is unreported but reproduced at App.3-35. The opinion of the Wyoming Circuit Court is unreported but reproduced at App.36-43.

JURISDICTION

The Wyoming District Court entered judgment on April 25, 2017. Petitioner filed a timely petition for review with the Wyoming Supreme Court, which was

denied on June 6, 2017. On August 9, 2017, Justice Sotomayor extended the time for filing this petition to and including October 5, 2017. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Supremacy Clause, U.S. Const. art. VI, cl. 2; Article IV of the Treaty with the Crow Indians, May 7, 1868, 15 Stat. 649; the Act to Repeal Timber-Culture Laws, §§10, 24, 26 Stat. 1095 (1891) ("Forest Reserve Act"); and President Cleveland's proclamation establishing the Bighorn National Forest, Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897), are reproduced at App.44-48.

STATEMENT OF THE CASE

A. Background

1. In the nineteenth century, the territory controlled by the Crow Tribe of Indians was vast, stretching across tens of millions of acres and including large parts of what are now the states of Montana and Wyoming. *See Montana v. United States*, 450 U.S. 544, 547-48 (1981). That situation changed in 1868, when the U.S. government and the Tribe signed a treaty, which was ratified by the Senate and signed by President Andrew Johnson. *See* Treaty with the Crow Indians, May 7, 1868, 15 Stat. 649 ("1868 Treaty"). Under the 1868 Treaty, the United States created the Crow Indian Reservation in present-day southern Montana from roughly 8 million acres of the Tribe's land, and the Tribe ceded the remainder of its aboriginal territory to the United States in exchange for payments, goods, and federal protection of its members and remaining lands. *Id.*

art. IV-XII, 15 Stat. at 650-52; *see also Montana*, 450 U.S. at 547-48.

The 1868 Treaty also guaranteed certain hunting rights for the Tribe beyond the boundaries of the Reservation. Specifically, Article IV of the treaty provided that the Tribe "shall have the right to hunt on the unoccupied lands of the United States" that the Tribe had ceded—including lands in present-day Wyoming—"so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV, 15 Stat. at 650. Those hunting rights were central to the Tribe's ability to provide for itself, and the agreement's reference to "unoccupied lands" accommodated the interests of non-Indian settlers who were expected to eventually arrive and settle on portions of the Tribe's ceded lands. *See* R.249-51.[1]

Over the next half-century, Congress ratified a number of other agreements that further diminished the Crow Reservation. But in those agreements, Congress made clear that the rights reserved by the Tribe under the 1868 Treaty remained in effect, except as specifically modified. *See, e.g.*, Appropriations Act of Mar. 3, 1891, 26 Stat. 989, 1042 (providing that "all existing provisions of the treaty of May seventh Anno Domini eighteen hundred and sixty-eight ... shall continue in force"); *accord* Act of Apr. 27, 1904, art. VII, 33 Stat. 352, 355 ("The existing provisions of all former treaties with the Crow tribe of Indians not inconsistent with the provisions of this agreement, are

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[1] "R." refers to the record on appeal before the Wyoming District Court.

hereby continued in force and effect."). None of those agreements altered the rights of Tribe members to hunt on the lands that the Tribe had ceded in 1868.

2. In 1890, the Wyoming Territory became the state of Wyoming. *See* Wyoming Statehood Act, 26 Stat. 222 (1890). At that time, the federal government made a number of land grants to the new state. *See, e.g.*, *id.* §§4, 6, 8-11, 26 Stat. at 222-24. As was common practice with many new states in the American West, however, the federal government never ceded title to wide swaths of other land in Wyoming. *See id.* §12, 26 Stat. at 224 ("That the State of Wyoming shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act."); *see also* Wyo. Const. art. XXI, §26 ("The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof.").[2] Among the lands that remained federally owned after Wyoming's statehood were the lands that the Tribe had ceded in the 1868 Treaty.

3. In 1891, Congress enacted a statute—commonly known as the "Forest Reserve Act"—that gave the President the power to establish forest preserves from federal lands in the public domain. Act to Repeal Timber-Culture Laws, §24, 26 Stat. 1095, 1103 (1891) ("Forest Reserve Act"). That statute included express anti-abrogation language, providing that "nothing in this act shall change, repeal, or

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[2] The federal government continues to own 48.4% of all land in Wyoming. *See* Carol Hardy Vincent et al., Cong. Research Serv., *Federal Land Ownership: Overview and Data* 9 (2017).

modify any agreements or treaties made with any Indian tribes for the disposal of their lands." *Id.* §10, 26 Stat. at 1099. Thus, under the Forest Reserve Act, when a President establishes a national forest from federal lands that were previously ceded by an Indian tribe, the tribe and its members retain the rights reserved by any earlier treaty that remains good law.

In 1897, pursuant to the 1891 statute, President Grover Cleveland issued a proclamation establishing the Big Horn (now Bighorn) National Forest from federal land in northern Wyoming—*i.e.*, the area constituting the Tribe's aboriginal hunting grounds, which the Tribe had ceded to the federal government in 1868. Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897). The proclamation explicitly "reserved from entry or settlement" that land, *id.* at 909, and made clear that all persons were prohibited from occupying the land from that moment forward: "Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation," *id.* at 910. The Bighorn National Forest has remained a federal forest ever since. *See, e.g.*, 16 U.S.C. §475.

4. Between 1868 and 1995, members of the Crow Tribe continuously hunted in the Bighorn National Forest, almost entirely free of state interference.[3] R.251. In 1995, however, the Tenth Circuit upset those longstanding expectations in *Crow Tribe of*

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[3] In the early 1970s, Wyoming attempted to prosecute a member of the Crow Tribe for killing a deer in the Bighorn National Forest. After the U.S. Department of Interior's Field Solicitor intervened on the defendant's behalf, the state court dismissed the charges. R.251.

Indians v. Repsis, 73 F.3d 982, 992 (10th Cir. 1995). In *Repsis*, the Tenth Circuit—relying on this Court's decision in *Ward v. Race Horse*, 163 U.S. 504 (1896)—held that the "Tribe's right to hunt reserved in" the 1868 Treaty was "repealed by the act admitting Wyoming into the Union." *Id.* at 992 (citing *Race Horse*, 163 U.S. at 514); *see also id.* at 994 (concluding that Tribe's right to hunt "was repealed with Wyoming's admission into the Union"). The Tenth Circuit also concluded, in a brief "alternative basis for affirmance," that the treaty rights were abrogated by the establishment of the Bighorn National Forest, which "resulted in the 'occupation' of the land." *Id.* at 993.

Four years later, however, in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), this Court held that the principal theory on which *Repsis* (and *Race Horse*) rested—abrogation upon admission to the Union under the so-called "equal footing" doctrine—was no longer good law. *See id.* at 204-07. The Court also rejected the reasoning of *Race Horse* as "too broad to be useful." *Id.* at 206-07. Finally, it held that rights preserved in Indian treaties continue in force until the occurrence of an event "clearly contemplated" by the treaty, and that "[t]reaty rights are not impliedly terminated upon statehood." *Id.*

After concluding that *Mille Lacs* had repudiated the Tenth Circuit's *Repsis* decision, the Crow Tribal Legislature unanimously passed a joint resolution that marked a return to the pre-*Repsis* scope of the Tribe's off-reservation hunting rights under the 1868 Treaty. R.251-52.

B. Petitioner's Prosecution, the Pre-trial Proceedings, and Petitioner's Trial

1. Petitioner Clayvin Herrera is an enrolled member of the Crow Tribe who lives in St. Xavier, Montana, on the Crow Reservation. In January 2014, Petitioner and other members of the Tribe went hunting on the Reservation in Montana, hoping to obtain meat to feed their families and other Tribe members in the dead of winter. R.838. The group spotted a small herd of elk on the Reservation and, while pursuing the herd, crossed the state line into the Bighorn National Forest in Wyoming. The group shot and killed three elk and quartered, packed, and carried them back to the Reservation to feed Tribe members.[4]

After learning about the January 2014 elk hunt, and notwithstanding the 1868 Treaty, Wyoming authorities traveled to the Reservation in Montana to cite Petitioner for two criminal misdemeanors under Wyoming law—one for taking an antlered big game animal during a closed-hunting season, and the other for being an accessory to the same. Wyo. Stat. §§23-3-102(d), 23-6-205.[5]

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[4] Herrera used the elk to feed his three young daughters elk spaghetti and elk "Hamburger Helper" throughout the winter. The three elk were a small part of the large herd that the trial court recognized "migrate[s] in the Big Horn Mountains between the [Bighorn National Forest] and the Crow Reservation." App.42.

[5] It is undisputed that the federal government allows year-round treaty hunting in the national forests, and that January is not a closed season for elk hunting under the Crow Tribe's fish-and-game laws. R.125; R.591.

2. After pleading not guilty and waiving his right to a speedy trial, Petitioner moved to dismiss the charges against him, arguing that the 1868 Treaty allowed him to hunt in the Bighorn National Forest, thereby rendering him immune from criminal prosecution. The state of Wyoming opposed the motion, contending as relevant here that the hunting rights guaranteed under the 1868 Treaty were abrogated either by Wyoming's 1890 statehood or by the 1897 establishment of the Bighorn National Forest.

In October 2015, the Wyoming Circuit Court denied Petitioner's motion to dismiss. The court declared itself "bound by" the Tenth Circuit's holding in *Repsis* that "Crow Tribe members do not have off-reservation treaty hunting rights anywhere within the state of Wyoming." App.38. The court added that this Court's *Mille Lacs* decision "had no effect on the *Repsis* decision." App.39. The trial court thus denied Petitioner immunity as a matter of law without even conducting a hearing, and precluded Petitioner from even mentioning at trial his federal treaty right to hunt elk in the Bighorn National Forest. App.43.

Petitioner filed an interlocutory appeal to the Wyoming District Court.[6] On April 5, 2016, the

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[6] The Wyoming District Courts are the trial courts of general jurisdiction in the state, but they also serve as the appellate courts to the Circuit Courts, which have jurisdiction over all misdemeanor cases. Review of District Court decisions may only be had in the Wyoming Supreme Court. Wyoming does not have an intermediate appellate court system. *See, e.g.*, *About The District Courts*, Wyo. Judicial Branch, http://bit.ly/2xd73ik (last visited Oct. 3, 2017).

district court dismissed the appeal for lack of jurisdiction, holding that the order was not appealable under the collateral order doctrine. Petitioner then asked the Wyoming Supreme Court for review of that decision and a stay of his criminal trial (scheduled for April 27). After the Wyoming Supreme Court failed to act, Petitioner sought an emergency stay of his trial from Justice Sotomayor. *See* No. 15A1105. On April 26, the Wyoming Supreme Court and Justice Sotomayor nearly concurrently denied his requests for a stay. The Wyoming Supreme Court did not act on Petitioner's petition for review of his immunity appeal before the trial date.[7]

A jury trial was held over three days. With Petitioner unable even to mention the 1868 Treaty, the verdict came swiftly; he was convicted on both charges. App.9. Petitioner was fined $8,000, received a one-year suspended jail sentence, and had his hunting privileges suspended for three years. *Id.*

C. The Wyoming District Court's Decision

Following his conviction, Petitioner again appealed to the Wyoming District Court, again arguing that the hunting rights guaranteed by the 1868 Treaty afforded him immunity from criminal prosecution. Following briefing, the court *sua sponte* requested supplemental briefing on the question whether principles of collateral estoppel bound Petitioner, a member of the Crow Tribe, to the 1995 *Repsis* decision, in which the Crow Tribe was a party.

The district court affirmed. Recognizing the "issue in this case" as "the continued validity of the off-

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[7] That petition was ultimately denied on May 10, 2016.

reservation treaty hunting right," App.13, the court concluded that, as a matter of collateral estoppel, Petitioner was bound by *Repsis*, App.31. The court acknowledged that federal law controlled the collateral estoppel question, and that under that federal law, collateral estoppel does not apply when there has been an "intervening change in the applicable legal context." App.19 (quoting Restatement (Second) of Judgments §28 (1982)). The court nevertheless held that the intervening *Mille Lacs* decision had not fatally undercut *Repsis*. It conceded that *Mille Lacs* repudiated the vast majority of the reasoning in the 1896 *Race Horse* decision on which *Repsis* was "largely based." App.21. But it concluded that *Repsis* still controlled because *Mille Lacs* purportedly left undisturbed an "alternative holding" announced in *Race Horse* and mentioned in *Repsis*—*viz.*, that treaty rights may be abrogated if they are only "temporary and precarious" rights. App.22-24. Accordingly, the district court concluded that Petitioner could not "relitigate the validity of the off-reservation treaty hunting right that was previously held to be invalid in the *Repsis* case." App.31.

The district court also announced an "alternative" holding "[e]ven if collateral estoppel did not apply." App.31. Its "alternative" analysis, however, simply repeated its earlier reasoning that *Mille Lacs* did not fatally undercut *Race Horse* or *Repsis*. Rather, the district court believed, *Mille Lacs* reaffirmed that courts must "look at the language in the treaty to determine whether it was intended to be perpetual." App.34. According to the district court, *Race Horse* conducted that analysis and "concluded that the rights

granted in the treaty [at issue there] were temporary in nature, and they were not intended to survive ... statehood." App.32. "Similarly," the court continued, the *Repsis* court "found that 'the Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union,'" and "alternatively held that the treaty rights were no longer valid, because 'the creation of the Big Horn National Forest resulted in the "occupation" of the land.'" App.33. The "analysis and conclusions of the *Repsis* case," the district court concluded, were "appropriate," App.34; accordingly, it was "proper" for the trial court to have prohibited Petitioner from asserting the 1868 Treaty as a bar to his prosecution. *Id.*

Petitioner timely filed a petition for writ of review with the Wyoming Supreme Court, which was denied without explanation in a one-page order. App.1-2.

REASONS FOR GRANTING THE PETITION

A Wyoming state court has upheld Petitioner's criminal conviction by declaring Native American rights enshrined in a 149-year-old federal treaty extinct. The decision below ignores this Court's precedents, badly misconstrues the Tribe's 1868 Treaty, and creates a clear split with federal and state courts, all while imperiling the ability of Tribe members to provide for their families as they—and other Native Americans, pursuant to similar treaties—have done for over a century. Only this Court can correct this injustice, resolve the unsettled case law, and reaffirm the federal treaty-based rights that the Tribe and other Native Americans have long enjoyed.

Nothing has abrogated the Tribe's treaty right to hunt on "unoccupied" federal lands, including in the Bighorn National Forest where Petitioner was engaged in subsistence hunting. The court below relied on the Tenth Circuit's *Repsis* decision, which invoked this Court's *Race Horse* decision to conclude that the rights preserved in the 1868 Treaty were abrogated by Wyoming's admission to the Union in 1890 and by the 1897 establishment of the Bighorn National Forest. But this Court's superseding decision in *Mille Lacs* rejected *Race Horse*'s reasoning and conclusively held that "[t]reaty rights are not impliedly terminated upon statehood." 526 U.S. at 207. And President Cleveland's proclamation establishing the Bighorn National Forest—issued pursuant to a federal statute expressly disclaiming the abrogation of treaties with Native Americans—explicitly *prohibited* "entry or settlement" in that land, thus foreclosing the oxymoronic proposition that creation of the national forest rendered the land "occupied" within the meaning of the 1868 Treaty. Unsurprisingly, there is no evidence that either of the parties to the 1868 Treaty had that understanding of the relevant language, and much evidence to the contrary.

The profoundly incorrect decision below has only added to the split that *Repsis* created with other federal courts of appeals and state high courts, rendering the need for this Court's review even more clear. Contrary to the Tenth Circuit and the decision below, the Ninth Circuit has squarely rejected the notion that the Forest Reserve Act that led to the establishment of the Bighorn National Forest gave the President the power to extinguish Indian treaty

rights. Moreover, multiple state high courts interpreting materially indistinguishable provisions in other Indian treaties have concluded that *Race Horse* (upon which *Repsis* relied) is no longer good law and that national forests are not occupied land.

This case therefore cries out for this Court's review, and this is an ideal vehicle to resolve the exceptionally important federal question it presents. The relevant facts are undisputed, and the issue was exhaustively argued and addressed at multiple stages of the state proceedings. Though the decision below rejected Petitioner's claim by invoking *Repsis* and collateral estoppel, that presents no bar to review, since under well-established federal-law principles, a "change in the applicable legal context" precludes application of the doctrine. *Bobby v. Bies*, 556 U.S. 825, 834 (2009). *Mille Lacs* undoubtedly changed the applicable legal context, but regardless, whether it did so *vel non* is part and parcel of the question presented on the merits. Because the Court's answer to the question presented will also answer whether there was a change in the applicable legal context that defeats collateral estoppel, the latter doctrine poses no obstacle to certiorari.

In short, this Court need only answer the clean legal question of whether the 1868 Treaty has been abrogated or not. If the answer to that question is yes, and the Tribe's federal treaty rights persist notwithstanding Wyoming's admission to the Union and the creation of the Bighorn National Forest, the judgment below must be reversed, regardless of collateral estoppel principles. But if the answer to that question is no, and Petitioner and other Tribe

members—to say nothing of other Native Americans subject to similar treaties—really can be criminally prosecuted for attempting to provide for their families despite a century-old treaty indicating otherwise, they are entitled to have this Court, not a state court, render that extraordinary judgment. In either case, the Court's intervention is warranted.

I. The Decision Below Is Profoundly Wrong.

The Crow Tribe's 1868 Treaty with the United States provides that the Tribe "shall" have the continuing "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV, 15 Stat. at 650. The Wyoming District Court nonetheless concluded that Petitioner and other members of the Tribe have *no* right whatsoever to hunt in the Bighorn National Forest. The court reached that categorical result after relying exclusively on the Tenth Circuit's *Repsis* decision, which concluded, first, that Wyoming's 1890 admission to the Union abrogated the Tribe's right to hunt on unoccupied federal lands in Wyoming, *see* 73 F.3d at 992-93; and, alternatively, that the Bighorn National Forest ceased to be "unoccupied" when President Cleveland proclaimed it a national forest in 1897, thereby abrogating the Tribe's hunting rights, *id.* at 993. Each of these grounds is profoundly wrong, as is, consequently, the district court's decision relying on *Repsis*.

A. Wyoming's Admission to the Union Did Not Abrogate the Crow Tribe's Treaty Rights.

Petitioner need not belabor the point that Wyoming's admission to the Union in 1890 did not extinguish his right under the 1868 Treaty to hunt in the Bighorn National Forest. Under this Court's precedents, the notion that statehood impliedly abrogates Indian treaty rights—the first basis for the *Repsis* decision—is no longer good law.

In 1896, this Court in *Race Horse* examined a provision of the 1869 treaty between the Bannock Tribe of Indians and the United States, which reserved for members of that Tribe "the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts," 163 U.S. at 507—*i.e.*, a provision worded identically to Article IV of the Crow Tribe's 1868 Treaty. The Court concluded that Wyoming's admission to the Union in 1890 abrogated the Bannock's right to hunt upon unoccupied federal lands under the so-called the "equal footing" doctrine, the principle that new states "are endowed with powers and attributes equal in scope to those enjoyed by the states already admitted," including the right to regulate hunting within their borders. *Id.* at 514-15. In applying that doctrine, the Court determined that the Bannock's hunting right and Wyoming's right to regulate hunting were in "irreconcilable" conflict, and thus concluded that the Bannock's hunting right had been impliedly abrogated by Wyoming's subsequent statehood. *Id.* at 514. The Court also noted that the

Bannock treaty had reserved only a "temporary and precarious" right to hunt on federal lands that was not "intended" to survive statehood. *Id.* at 515.

Just over a century later, in 1999, this Court thoroughly repudiated *Race Horse*. In *Mille Lacs*, the Mille Lacs Band of Chippewa Indians brought suit against the state of Minnesota seeking a declaration that they retained hunting rights under an 1837 federal treaty between several Chippewa Bands of Indians and the federal government. 526 U.S. at 185. That treaty preserved for the Chippewa the "privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" by those Indians to the United States. *Id.* at 177. Relying on *Race Horse*, Minnesota contended that its admission to the Union in 1858 terminated those Indian treaty rights. *Id.* at 202-03.

The Court resoundingly rejected that argument, declaring that "statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." *Id.* at 205. More broadly, the Court held, Indian "[t]reaty rights are not impliedly terminated upon statehood." *Id.* at 207. The Court explained that *Race Horse* had incorrectly reached the opposite conclusion by relying on the "false premise" that treaty-protected hunting rights "conflict[] irreconcilably with state regulation of natural resources." *Id.* at 204. To the contrary, the Court explained, those two interests are entirely reconcilable: States may regulate treaty-protected hunters, but only when doing so is necessary as a "conservation" measure, as the Court had concluded in several decisions in the decades following *Race Horse*.

Id. at 204-05 (citing *Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), and *Antoine v. Washington*, 420 U.S. 194, 207-08 (1975)).

Having disposed of the "equal footing" doctrine of *Race Horse* as a basis for abrogating treaties with Native Americans, the Court then addressed the dissent's objection that *Race Horse* established a rule that certain "temporary and precarious" treaty rights "are not intended to survive statehood." *Id.* at 206. The Court rejected this argument, too, holding that "the 'temporary and precarious' language in *Race Horse* is too broad to be useful." *Id.* As the Court noted, "any right created by operation of federal law could be described as 'temporary and precarious,' because Congress could eliminate the right whenever it wished." *Id.* at 207. In short, "the line suggested by *Race Horse* is simply too broad to be useful as a guide to whether treaty rights were intended to survive statehood." *Id.* Instead, the Court observed, the "focus" must be on those conditions or events (if any) that the parties themselves intended to serve as "fixed termination point[s]" abrogating treaty rights. *Id.* at 207. Using *Race Horse* as an example, the Court explained that the treaty there "'clearly contemplated'" that "the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States." *Id.* (quoting *Race Horse*, 163 U.S. at 509). But "there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood." *Id.*

Mille Lacs squarely forecloses the proposition that Wyoming's admission to the Union terminated the

Crow Tribe's treaty-protected right to hunt on unoccupied federal lands, including in the Bighorn National Forest. And it just as squarely abrogates the principal ground relied upon by the *Repsis* decision (the only decision invoked by the district court here). *Repsis* unambiguously held that "[t]he Tribe's right to hunt reserved in the [1868 Treaty] was repealed by the act admitting Wyoming into the Union." 73 F.3d at 992. Indeed, for good measure, it declared *Race Horse* "compelling, well-reasoned, and persuasive," and it cited *Race Horse* for the proposition that the hunting right preserved in the 1868 Treaty was a "temporary right" that was "repealed with Wyoming's admission into the Union." *Id.* at 994. *Mille Lacs* rejects that reasoning across the board, from the notion that statehood abrogates treaty hunting rights to the "too broad" construct of "temporary" rights. 526 U.S. at 206; *see also id.* at 219 (Rehnquist, C.J., dissenting) (stating that "the Court ... effectively overrules *Race Horse*"); *State v. Buchanan*, 978 P.2d 1070, 1083 (Wash. 1999) ("[T]he United States Supreme Court effectively overruled *Race Horse* in *Minnesota v. Mille Lacs*.").

Furthermore, because the relevant language of the 1868 Treaty is identical to that of the treaty addressed in *Race Horse* and re-examined in *Mille Lacs*, the *Mille Lacs* decision also confirms what the parties to the 1868 Treaty "'clearly contemplated'" as conditions for preservation of the Tribe's hunting rights. 526 U.S. at 207. Specifically, the parties "contemplated that the rights would continue only so long as [1] the hunting grounds remained unoccupied and [2] owned by the United States." *Id.* The conditions also included that "[3] game may be found

thereon, and ... [4] peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV, 15 Stat. at 650. These are the four conditions relevant to assessing the Tribe's continued hunting rights—not Wyoming's statehood *vel non*. And each of those conditions remains fulfilled to this day.

B. The Establishment of the Bighorn National Forest Did Not Abrogate the Crow Tribe's Treaty Rights.

Repsis and the decision below provided only one other basis for categorically abrogating the Tribe's treaty right to hunt in the Bighorn National Forest: Those formerly unoccupied federal lands became "occupied" simply by virtue of being declared a national forest in 1897. App.22. As *Repsis* put it, because the land comprising the Bighorn National Forest was "no longer available for settlement," creation of the forest "resulted in the 'occupation' of the land." 73 F.3d at 993. That reasoning "sounds absurd, because it is." *Sekhar v. United States*, 133 S. Ct. 2720, 2727 (2013).

President Cleveland's 1897 proclamation establishing the Bighorn National Forest expressly "reserved from entry or settlement" the land comprising the forest, and warned "all persons not to make settlement upon" the land. Proclamation No. 30, 29 Stat. at 909-10.[8] By barring "entry or settlement"

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[8] The *Repsis* court stated that "Congress created" the Bighorn National Forest "in 1887." That assertion is wildly inaccurate and emblematic of the court's haphazard approach to this issue. In *1891*, Congress enacted the Forest Reserve Act, which gave the President the power to establish national forests. Pursuant

on the land constituting the new national forest, the proclamation accomplished just the opposite of "occupation." No ordinary English speaker would understand a *prohibition* on the entry or settlement of vast, empty, and undisturbed land to mean that the land suddenly became "occupied."

Plain English aside, Indian treaties are interpreted "to give effect to the terms as the *Indians themselves* would have understood them." *Mille Lacs*, 526 U.S. at 196. The record in this case demonstrates that like "other Western Indians," the Crow Tribe understood "unoccupied lands of the United States" in the 1868 Treaty to mean "land undeveloped by white settlers." R.250. In other words, the "'clearly contemplated event'" terminating the Tribe's hunting rights, *Mille Lacs*, 526 U.S. at 207, was actual, physical settlement of its aboriginal hunting grounds—not a sort of metaphysical "occupation" by non-settlement. There is certainly "no evidence" that the Tribe "understood [the] fine legal distinctions" that the *Repsis* court purported to draw, and which the court below validated. *Id.* at 206. In any event, even if the phrase "unoccupied lands of the United States" were somehow ambiguous, the ambiguity must be resolved *in favor* of the Crow Tribe—not against it. *See id.* at 200 (explaining that that "Indian treaties are to be interpreted liberally in favor of the Indians," and "ambiguities are to be resolved in their favor").

Finally, President Cleveland's proclamation establishing the Bighorn National Forest could not

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to that statute, in *1897*, President Cleveland established the Bighorn National Forest via proclamation.

have abrogated the Tribe's hunting rights under the 1868 Treaty because the President lacked the authority to do so. The President's "power, if any, to issue" the proclamation must have stemmed "either from an act of Congress or from the Constitution itself." *Id.* at 188-89 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). When President Cleveland established the Bighorn National Forest in 1897, he did so pursuant to a single act of Congress: the Forest Reserve Act. *See* Proclamation No. 30, 29 Stat. at 909. That statute delegated authority to the President "to set apart and reserve" the "public land[s]" in "any State or Territory" so long as those lands were "bearing forests." Forest Reserve Act, §24, 26 Stat. at 1103. But in enacting that statute, Congress made crystal clear its intent regarding Indian treaty rights: "[N]othing in this act shall change, repeal, or modify any ... treaties made with any Indian tribes for the disposal of their lands." *Id.* §10, 26 Stat. at 1099.

Congress thus explicitly *barred* the President from abrogating Indian treaty rights in establishing national forests. Moreover, Congress' prohibitive language was the opposite of the "clear and plain" intent that is required before it (or anyone else) may abrogate Indian treaties. *United States v. Dion*, 476 U.S. 734, 738 (1986). Accordingly, even if President Cleveland had sought to render the Crow Tribe's aboriginal hunting grounds "occupied" via his proclamation, he lacked the legal authority to abrogate the Tribe's treaty rights in the process. *See Mille Lacs*, 526 U.S. at 189-90 (concluding that Removal Act did not authorize presidential order terminating Chippewa hunting rights).

But there is no need to ascribe such motives to President Cleveland or his proclamation. As a matter of ordinary English and common sense, prohibiting "entry or settlement" on land does not cause that land to become "occupied." And there is no evidence that the Crow Tribe—or anyone—thought otherwise when the 1868 Treaty was ratified or when the Bighorn National Forest was established.

II. Courts Are Divided Over Whether Indian Treaty Rights Apply On Federal Lands Later Proclaimed National Forests.

In light of the errors in *Repsis* and the decision below relying upon it, it is unsurprising that those two cases are on the wrong side of a split of authority that only this Court can resolve. To begin with, the decision below rejected the proposition that *Mille Lacs* "'effectively overrule[d] *Race Horse*.'" App.24 n.6 (quoting 526 U.S. at 219 (Rehnquist, C.J., dissenting)). Other courts, however, have correctly recognized that this Court "effectively overruled *Race Horse* in ... *Mille Lacs*." *Buchanan*, 978 P.2d at 1083.

Furthermore, in contrast to *Repsis* and the decision below, other federal courts of appeals and state supreme courts have concluded that the Forest Reserve Act cannot be invoked to abrogate Indian treaty rights and that national forests remain "unoccupied" federal lands. In *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983), for example, the Ninth Circuit addressed an 1898 treaty in which the Shoshone-Bannock Tribes ceded lands in Idaho to the United States but reserved the rights "to cut timber for their own use, ... to pasture their livestock on said public lands, and to hunt thereon and to fish in the

streams thereof." *Id.* at 714. In 1907, pursuant to the Forest Reserve Act, President Theodore Roosevelt issued a proclamation declaring those lands the Port Neuf Forest Reserve (later known as the Caribou National Forest). *Id.* Decades later, non-Indian plaintiffs argued that the rights in the 1898 treaty had "been extinguished by" Roosevelt's "executive action." *Id.* at 715. Specifically, they argued that the Forest Reserve Act, having "empower[ed] the President to withdraw public lands from settlement," also "gave him the power to *extinguish* Indian treaty rights in those lands." *Id.* at 717 (emphasis added).

In contrast to the Tenth Circuit in *Repsis* and the decision below, the Ninth Circuit squarely "reject[ed] that reading of the [Forest Reserve] Act." *Id.* The plaintiffs had not identified "any congressional enactment which purports to abrogate the Tribes' treaty rights," nor "any post-[treaty] delegation by Congress to the President of authority to abrogate Indian treaty rights without congressional consent." *Id.* at 718; *see also Kimball v. Callahan*, 493 F.2d 564, 570 (9th Cir. 1974) (holding that treaty-preserved hunting, trapping, and fishing rights apply on "land now constituting United States national forest land").

Numerous state courts of last resort have also concluded that national forestland is unoccupied, open, and unclaimed within the meaning of various Indian treaties. In *State v. Tinno*, 497 P.2d 1386 (Idaho 1972), the Supreme Court of Idaho considered an 1868 Treaty between the United States and the Eastern Band Shoshone and Bannock Tribes, which preserved fishing rights on the "unoccupied lands of the United States." *Id.* at 1389-90. The defendant, a

member of the Shoshone-Bannock Tribes, had been prosecuted by Idaho for fishing in the Challis National Forest. *Id.* at 1391. In addressing whether those lands fit within the scope of the treaty, the court concluded that "[a] plain reading of the treaty provision would lead to the conclusion that there is no serious geographical question presented." *Id.*; *see also State v. Arthur*, 261 P.2d 135, 141 (Idaho 1953) (concluding that "the National Forest Reserve upon which the game in question was killed was 'open and unclaimed land'").

Likewise, in *State v. Stasso*, 563 P.2d 562 (Mont. 1977), the Montana Supreme Court addressed whether an 1885 treaty between the United States and the Confederated Salish and Kootenai Indian Tribes guaranteed "present day members of the ... Tribes ... a right to hunt ... on 'open and unclaimed lands.'" *Id.* at 563. In particular, the court considered "whether Forest Service land may be included within the meaning of 'open and unclaimed lands.'" *Id.* The court answered that question in the affirmative: "[T]he National Forest lands involved herein are open and unclaimed lands." *Id.* at 565.

Finally, in *Buchanan*, the Supreme Court of Washington also concluded that "open and unclaimed" lands include national forestland. *See* 978 P.2d at 1081 (citing *State v. Miller*, 689 P.2d 81, 82 n.2 (Wash. 1984) (en banc)). Indeed, that court specifically noted that it had aligned itself with the Idaho and Montana supreme courts in reaching that conclusion. *See id.* (explaining that national forestland is "open and unclaimed" land, "consistent with those [holdings] of other jurisdictions").

These decisions leave no doubt that courts in Idaho, Montana, Washington, or indeed anywhere in the Ninth Circuit would reject the proposition that the 1868 Treaty was abrogated because the relevant land was rendered "occupied" by either the Forest Reserve Act or the creation of the Bighorn National Forest. In the Tenth Circuit, however, precisely the opposite is true: President Cleveland's proclamation establishing the Bighorn National Forest rendered the land "occupied" and abrogated the 1868 Treaty. That the two circuits with the vast majority of national forestland disagree on this issue is reason enough to grant certiorari.[9] But when a Wyoming court employs the Tenth Circuit's analysis to permit the criminal conviction of a Native American for engaging in treaty-protected conduct, certiorari is not just warranted but imperative.

III. The Question Presented is Exceptionally Important, And There Are No Vehicle Issues.

Whether the Crow Tribe retains critical rights preserved by the 1868 Treaty is an issue of paramount importance meriting this Court's review. Indeed, the issue is little different from the issue this Court reviewed in *Mille Lacs*, a case addressing whether the Chippewa retained their hunting rights under an 1837 treaty with the United States. *See* 526 U.S. at 185; *see also United States v. Winans*, 198 U.S. 371, 381 (1905)

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[9] There are 188,330,377 acres of national forestland in the country, 162,316,168 of which—86%—are in the states comprising the Ninth and Tenth Circuits. *See* U.S. Forest Serv., Land Areas Report, Tables 1 & 4 (Sept. 30, 2016), http://bit.ly/2xM8W4r.

(describing such rights as "not much less necessary to the existence of the Indians than the atmosphere they breathe[]").[10] The significance of the question in this case is as manifest as it was in *Mille Lacs* or, a century earlier, in *Winans*: Its answer will determine not only whether the Crow Tribe can exercise rights it understandably thought preserved pursuant to binding agreement with the federal government, but also—and on a far more concrete level—whether the Tribe's members can engage in subsistence hunting foundational to their identity and well-being.

Furthermore, a number of other treaties between Indian tribes and the United States preserve Indian rights using language identical or materially identical to that in the 1868 Treaty. *See, e.g.*, Treaty Between the United States & the Navajo Tribe of Indians, art. IX, Aug. 12, 1868, 15 Stat. 667, 670 (preserving "the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase"); Treaty with the Eastern Band Shoshone and Bannock, art. IV, July 3, 1868, 15 Stat. 673, 674-75 (preserving "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts"); Treaty with the Nez Perces, art. III, June 11, 1855, 12 Stat. 957, 958 (preserving "the privilege of hunting,

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[10] In its petition for certiorari in *Mille Lacs*, the state of Minnesota prominently cited *Repsis* as conflicting with the Eighth Circuit decision this Court ultimately affirmed. *See* Pet. for Writ of Cert. 11-13, 15, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (No. 97-1337).

gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land"); Treaty of Hell Gate (Confederated Salish and Kootenai Tribes), art. III, July 16, 1885, 12 Stat. 975, 976 (preserving "the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land"); Treaty Between the United States and the Dwamish, Suquamish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, art. V, Jan. 22, 1855, 12 Stat. 927, 928 (preserving "the privilege of hunting and gathering roots and berries on open and unclaimed lands"). Accordingly, the issue here affects every other Indian tribe that reserved similar treaty rights.

All that said, the broader implications of this case for the Crow Tribe or Native Americans generally should not obscure the fact that the answer to the question presented will literally affect whether Petitioner will be able to provide for his family. Not only does the decision below forever strip Petitioner of his federally enshrined right to hunt in the Bighorn National Forest, Petitioner's sentence suspends *all* of his hunting privileges in the state of Wyoming for three years. That is no trifling concern. As this very case makes clear, whether Petitioner's family has food on the table during unforgiving Montana winters depends on his ability to exercise the off-reservation hunting rights long ago granted to his tribe. But instead of upholding those rights, the decision below upheld Petitioner's criminal conviction and sentence, all based on reasoning that has been soundly rejected.

The Court should not tolerate that result. And there are no obstacles to the Court's granting certiorari here. The only issue that the court below addressed, and that is before this Court, is the pure "question[] of law" whether the 1868 Treaty has been abrogated, either by Wyoming's admission to the Union or by the establishment of the Bighorn National Forest. App.9. That issue was thoroughly briefed in the proceedings below, and other federal courts of appeals and state supreme courts—to say nothing of this Court in *Mille Lacs*—have thoroughly addressed the effects, if any, of state enabling acts and the creation of national forests on Native American treaty rights. Further percolation, therefore, is unnecessary.

The collateral estoppel issue the court below introduced *sua sponte* also presents no obstacle to the Court's review.[11] As the court acknowledged, federal law governs this issue because the *Repsis* decision exclusively relied upon by the court is a "federal-court judgment" in a "federal-question case[]." *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008); App.12. And under well-established federal law, as this Court has repeatedly held, a prior judgment lacks preclusive effect when there has been an intervening "'change in [the] applicable legal context.'" *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (alteration in original) (quoting Restatement (Second) of Judgments §28 (1980)); *see*

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[11] Although the court below used the term "collateral estoppel," this Court has repeatedly observed that the term "issue preclusion" is preferable. *See Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 n.1 (2016); *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). This petition nevertheless uses the term "collateral estoppel" to remain consistent with the decision below.

also Limbach v. Hooven & Allison Co., 466 U.S. 353, 362 (1984); *Montana v. United States*, 440 U.S. 147, 161 (1979); *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 606 (1948).

That principle ends the matter here. There can be no serious dispute that *Mille Lacs* constituted a "change in [the] applicable legal context" that monumentally, if not fatally, undercut the controlling legal principles applied in *Repsis*. As the *Mille Lacs* dissent repeatedly remarked, *see* 526 U.S. at 219 & n.3, 220—without objection by the majority—the Court "effectively overrule[d]" *Race Horse*, the decision that *Repsis* deemed "compelling, well-reasoned, and persuasive" and upon which it principally relied in declaring the Tribe's hunting rights abrogated, 73 F.3d at 994.

Refusing to accept what both the *Mille Lacs* majority and dissent understood, the court below contended that *Mille Lacs* did *not* overrule *Race Horse*. Conceding that *Mille Lacs* "clearly rejected" the "equal footing" doctrine that *Repsis* "largely" relied upon, the court nevertheless believed that *Mille Lacs* only "arguably narrowed the 'temporary and precarious' doctrine." App.24 n.6. That is misguided on many levels. First, *Repsis* itself did not rely on any "temporary and precarious" doctrine to abrogate the 1868 Treaty; it squarely held that the Tribe's hunting rights were "repealed by the act admitting Wyoming into the Union," 73 F.3d at 992—the very proposition that even the court below conceded was overruled by *Mille Lacs*. *See B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) (noting that issue preclusion requires issue to have been

"determined by a valid and final judgment, and the determination is essential to the judgment").[12] Second, to the extent there ever was a "temporary and precarious" doctrine, *Mille Lacs* did not preserve it; the Court deemed it "too broad to be useful." 526 U.S. 207. That is why the dissent accused the majority of overruling the *Race Horse* decision *in toto*, not in part. Third, even if *Mille Lacs* only "narrowed" the "temporary and precarious" doctrine, that still constitutes a "change in [the] applicable legal context" triggering an exception to collateral estoppel. *Bobby*, 556 U.S. at 834.

Regardless, the Court's answer to the question presented will also answer whether there was a change in the "applicable legal context" that defeats collateral estoppel. If the Court were to hold on the merits that *Mille Lacs* fatally undercut *Repsis*, then *Repsis* would no longer have any collateral-estoppel effect.

In the end, not only does collateral estoppel pose no barrier to review; the superbly wrong application of that doctrine below only underscores why this Court

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[12] Because a determination must have been "essential to the judgment," the *Repsis* court's self-styled "alternative basis" for abrogation—the establishment of the Bighorn National Forest—does not collaterally estop further litigation of that issue. *See, e.g.*, *Bobby*, 556 U.S. at 835 ("A determination ranks as necessary or essential only when the final outcome hinges on it."); *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 910 (6th Cir. 2001) (holding that "where ... one ground for the decision is clearly primary and the other only secondary, the secondary ground is not necessary to the outcome for the purposes of issue preclusion"). Indeed, the court below did not remotely suggest otherwise.

must intervene. It simply cannot be the law that the treaty rights of thousands of Crow Tribe members, now and in the future, are forever held hostage to legal reasoning that would be merely bemusing if their livelihoods were not at stake. And it cannot be the case that an individual can be criminally convicted, fined, and barred from subsistence hunting for his family based on decisions that are contrary to this Court's precedents, out of step with other courts, and fundamentally unjust. At a minimum, if a treaty between Native Americans and the federal government really can be abrogated by a state's admission to the Union or the establishment of a national forest, Petitioner, his Tribe, and all Native Americans deserve to have this Court render that extraordinary judgment. In all events, certiorari is warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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October 5, 2017

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Appendix A

WYOMING SUPREME COURT

No. S-17-0129

CLAYVIN HERRERA,

Petitioner,

v.

THE STATE OF WYOMING, and THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT, SHERIDAN COUNTY,

Respondents.

April Term, A.D. 2017

Filed: June 6, 2017

ORDER DENYING PETITION FOR WRIT OF REVIEW

This matter came before the Court upon "Petitioner Clayvin B. Herrera's Petition for Writ of Review," filed herein May 10, 2017. After a careful review of the petition, the materials attached thereto, the "Response in Opposition to Petition for Writ of Review," the materials attached thereto, the "Reply to State of Wyoming's Response in Opposition to Petition for Writ of Review," and the file, this Court finds that the petition should be denied. It is, therefore,

ORDERED that the Petition for Writ of Review, filed herein May 10, 2017, be, and hereby is, denied; and it is further

ORDERED that the "Motion of Indian Law Professors Debra Donahue, Maylinn Smith, and Monte Mills for Leave to File an *Amicus Curiae* Brief in Support of Clayvin B. Herrera's Petition for Writ of Review," filed herein May 22, 2017, be, and hereby is, denied; and it is further

ORDERED that the "Motion of Crow Tribe of Indians for Leave to File *Amicus Curiae* Brief in Support of Clayvin B. Herrera's Petition for Writ of Review," filed herein May 22, 2017, be, and hereby is, denied.

DATED this 6th day of June, 2017.

BY THE COURT:

/s/

E. JAMES BURKE
Chief Justice

Appendix B

IN THE FOURTH JUDICIAL DISTRICT, SHERIDAN COUNTY, STATE OF WYOMING

No. 2016-242

CLAYVIN HERRERA,

Appellant,

v.

STATE OF WYOMING,

Appellee.

On Appeal from the Fourth Judicial Circuit Court, Sheridan County, Wyoming

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Filed: April 25, 2017

ORDER

John G. Fenn, District Court Judge

The above-entitled matter came before the Court on Appellant, Clayvin Herrera's appeal from the *Order Denying Motion to Dismiss, Striking Evidentiary Hearing and Granting State's Motion in Limine*, entered on October 16, 2015, the *Order After Pretrial Conference*, entered on April 18, 2016, and the *Judgment and Sentence* entered by the Fourth Judicial Circuit Court on April 29, 2016. Having reviewed the record, the briefs of the parties, and

being otherwise fully advised, the Court AFFIRMS the circuit court's orders and the *Judgment and Sentence*.

ISSUES

The Appellant frames the pertinent issues as follows:

1. Did the circuit court err in denying treaty-based immunity to Herrera by holding itself "bound by" an erroneous Tenth Circuit decision, and ruling—in the face of binding U.S. Supreme Court precedent and federal statutory language to the contrary—that the establishment of the BHNF in 1897 by presidential proclamation extinguished the Crow Treaty hunting rights even though Congress has never abrogated those rights?

2. Should the Court grant judgment of acquittal to Herrera, and dismiss the misdemeanor counts against him because the State did not, and cannot meet the controlling federal "conservation necessity" standard for prosecution of an otherwise immune treaty-hunter under state wildlife laws?

The Appellee frames the pertinent issues as follows:

I. Did the trial court err by following *Repsis* and ruling that the Article 4 hunting right was intended to be temporary and no longer exists?

II. Did the trial court err in ruling that the Big Horn National Forest is "occupied land" of the United States?

III. Did the trial court err in ruling that the State's elk seasons were enforceable on Appellant in the Big Horn National Forest because they are

reasonable and necessary for the purposes of conservation?

IV. If the trial court erred, what is the appropriate remedy?

The Court held oral argument in this matter, and it raised an additional question:

I. Do the doctrines of collateral estoppel, issue preclusion, or *res judicata* apply to preclude the Appellant from relitigating the validity of the off-reservation treaty hunting right?

FACTS

Herrera is an enrolled member of the Crow Tribe and a resident of St. Xavier, Montana, which is located on the Crow Reservation. In January 2014, Herrera and several other tribal members decided to hunt for elk on the Crow Reservation. They spotted several elk on the Reservation in the vicinity of Eskimo Creek. At some point, the elk crossed a fence, leaving the Crow Reservation and entering into the Big Horn National Forest in the State of Wyoming. Herrera and the others crossed the fence into Wyoming and continued to track the elk. They shot three bull elk and took the meat back with them to Montana. The elk were taken without a license and during a closed season. Herrera was cited with two misdemeanors, Taking an Antlered Big Game Animal Without a License or During a Closed Season, a violation of W.S. § 23-3-102(d), and Accessory to Taking Antlered Big Game Animal Without a License or During a Closed Season, a violation of W.S. § 23-6-205.

PROCEEDINGS BELOW

On July 2, 2015, Herrera filed a *Motion to Dismiss Under the Supremacy Clause of the United States Constitution and the Fort Laramie Treaty of 1868.* Herrera did not deny taking the elk, but he asserted that he had a right to hunt where and when he did under Article 4 of the Treaty with the Crow, 1868 ("Crow Treaty"). He argued that this treaty gave the Crow Tribe the right to hunt off of the reservation on the "unoccupied lands of the United States" that fell within territory that had been ceded by the Crow, and that this treaty right was still valid and preempted state law. The State filed a *Response* on August 6, 2015, and a *Supplemental Response* with exhibits on August 20, 2015. The State also asked for an evidentiary hearing so the State could offer evidence in support of its position, and it filed a *Motion in Limine re Affidavits* seeking to strike certain affidavits that had been filed with Herrera's motion. On August 20, 2015, the State filed a *Motion in Limine re Treaty Rights*, asking the trial court to prohibit Herrera from making reference to the asserted treaty hunting right at trial, if the circuit court determined that the treaty rights were no longer valid and provided no defense to the State's prosecution.

The circuit court held a status conference on September 1, 2015. It allowed the parties to submit additional briefing and agreed to schedule two evidentiary hearings. The first hearing was set for November 16, 2015, and it was intended to address the meaning of the Crow Treaty and its application to the site where the elk were killed. The second hearing was set for January, and it was set to address whether the

State's elk season regulations were reasonable and necessary for the purposes of conservation and therefore would apply to treaty hunters even if the off-reservation hunting right was still valid. On September 18, 2015, Herrera filed a *Limited Response to the State of Wyoming's Assertion of Conservation Necessity*. The State filed its *Second Supplemental Response* on October 5, 2015. Both parties submitted numerous exhibits in support of their positions.[1] Herrera asserted that no evidentiary hearings were needed, and the court should rule in his favor on all issues as a matter of law.

On October 16, 2015, the circuit court entered its *Order Denying Motion to Dismiss, Striking Evidentiary Hearings and Granting the State's Motion in Limine*. The trial court held that "[t]his issue of off-reservation treaty hunting rights is indistinguishable from the issue and arguments which were adjudicated in *Crow Tribe of Indians vs. Repsis*, 73 F.3d 982 (10th Cir. 1995)." The circuit court found itself to be "bound by the Tenth Circuit's holding that Crow Tribe members do not have off-reservation treaty hunting rights anywhere within the state of Wyoming." The circuit court also rejected Herrera's argument that

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[1] Many of the exhibits submitted by both parties contained inadmissible hearsay. The State objected to the hearsay contained in the affidavits filed by Herrera, but it does not appear that Herrera filed a formal objection to any of the State's exhibits. The circuit court never ruled on the admissibility of any of these exhibits, but it did cite to some of the laws and game codes that had been submitted by the State. Thus, it is unclear which of the exhibits the circuit court relied on when making its decision, or which of these exhibits, if any, were actually admitted into evidence by the court.

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999), had reversed and rejected the *Repsis* case as well as *Ward v. Race Horse*, 163 U.S. 504 (1896), upon which the *Repsis* decision was based. The circuit court agreed with the *Repsis* court's decision that the off-reservation treaty hunting right was intended to be temporary and is no longer valid. The circuit could alternatively held that even if the treaty rights still existed, the regulation at issue met the "conservation necessity" standard, and therefore the regulation would apply to treaty hunters. The circuit court then cancelled the evidentiary hearings that had been set, and trial was scheduled for April 27, 2016.

Herrera filed a *Petition for a Writ of Review, Writ of Certiorari and Writ of Prohibition* with the Wyoming Supreme Court on November 2, 2015. The Wyoming Supreme Court denied the *Petition* on November 23, 2015. Herrera had also filed a *Notice of Appeal* with this Court on November 12, 2015. The State moved to dismiss the appeal for lack of jurisdiction. This Court dismissed the appeal on April 5, 2016, finding that the *Order Denying Motion to Dismiss, Striking Evidentiary Hearings and Granting the State's Motion in Limine* was not a final, appealable order.

Herrera then asked the circuit court to reconsider its position on the State's *Motion in Limine re Treaty Rights.* The circuit court denied this motion in the *Order After Pretrial Conference*, issued on April 18, 2016. The circuit court held that at the time of the alleged violations the controlling law was that members of the Crow Tribe had no off-reservation

treaty hunting rights, and therefore they had no right to hunt in the Big Horn National Forest in violation of Wyoming law. Herrera sought a stay of his trial from both the Wyoming Supreme Court and the Supreme Court of the United States, but neither stay was granted, and his trial commenced on April 27, 2016.

At trial, because a treaty rights defense was not available, Herrera attempted to argue that he was not off of the reservation when he and his companions took the elk. He admitted that he crossed the fence, but claimed that the fence did not mark the true boundary between Wyoming and Montana. The State presented evidence that the spot where the elk were killed is within Sheridan County, Wyoming, and that Herrera knew he was off of the reservation when he killed the elk. The jury convicted Herrera of both counts, and he was given concurrent sentences of one (1) year in jail suspended in lieu of unsupervised probation, three (3) years of suspended hunting privileges, and $8,080.00 in fines and court costs. This appeal followed. Herrera is not challenging anything that occurred at his trial. Rather, he is appealing the circuit court's pretrial decisions on the validity of the off-reservation treaty hunting right.

STANDARD OF REVIEW

This case raises questions of law which are reviewed *de novo,* and the Court affords no deference to the trial court's determinations on the issues. *See, e.g., Bear Cloud v. State,* 2014 WY 113, ¶ 13, 334 P.3d 132, 137 (Wyo. 2014). However, "if the determination of the trial court is correct on any theory it will not be disturbed, or if there exists any legally valid ground appearing in the record, [this Court] must affirm."

Matter of Adoption of RHA, 702 P.2d 1259, 1263 (Wyo. 1985) (citing *Anderson v. Bauer*, 681 P.2d 1316 (Wyo. 1984); *Valentine v. Ormsbee Exploration Corp.*, 665 P.2d 452 (Wyo. 1983); *People v. Fremont Energy Corp.*, 651 P.2d 802 (Wyo. 1982); *ABC Builders, Inc. v. Phillips*, 632 P.2d 925 (Wyo. 1981)).

DISCUSSION

I. Collateral Estoppel, Issue Preclusion, and Res Judicata

The crux of Herrera's argument seems to be that the *Repsis* court incorrectly interpreted the Crow Treaty, and because that interpretation was incorrect, the circuit court should have reinterpreted the treaty under the "proper" federal standards of treaty interpretation. Thus, it appears that Herrera is either directly or indirectly attempting to relitigate the issue that was previously raised and decided in *Repsis*. The Court was concerned that he may be precluded from doing so under the doctrines of collateral estoppel, issue preclusion, or *res judicata*, and it asked the parties to submit additional briefing on this issue.[2] The Court asked the parties to address collateral

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[2] Although the parties did not raise this issue, it is proper for the Court to raise this issue *sua sponte* when no factual development is required, and the parties are given an opportunity to fully brief the issues. *See Hawkins v. Risley*, 984 F.2d 321, 324 (9th Cir. 1993). Allowing the appellate court to raise the issue *sua sponte* is consistent with policies of avoiding unnecessary judicial waste and fostering reliance on judicial decisions by precluding relitigation. *Merrilees v. Treasurer, State of Vt.*, 159 Vt. 623, 623-24, 618 A.2d 1314, 1315-16 (1992) (citing *Dakota Title & EsCrow Co. v. World-Wide Steel Systems, Inc.*, 238 Neb. 519, 525-26, 471 N.W.2d 430, 434-45 (1991); *Wilson v. United States*, 166 F.2d 527,529 (8th Cir. 1948)).

estoppel, issue preclusion, and *res judicata*, because the doctrines are related, and the terms have sometimes been used interchangeably. A good summary of these doctrines is set out in *Goodman v. Voss*, 2011 WY 33, ¶ 23, 248 P.3d 1120, 1126 (Wyo. 2011), where the Wyoming Supreme Court held:

> Collateral estoppel and *res judicata* are analogous, but not synonymous. Although they share a common interest in finality, the doctrines themselves are different. *Tenorio v. State ex rel. Wyoming Workers' Compensation Div.*, 931 P.2d 234, 238 (Wyo. 1997). We recently reiterated their differences:
>
> > In *Eklund v. PRI Environmental, Inc.*, 2001 WY 55, ¶ 15-20, 25 P.3d 511, [517-18] (Wyo. 2001), we extensively recognized that *res judicata* and collateral estoppel are related but distinct concepts.
> >
> > *Res judicata* bars the relitigation of previously litigated claims or causes of action. *Slavens v. Board of County Commissioners*, 854 P.2d 683, 686 (Wyo. 1993). Four factors are examined to determine whether the doctrine of *res judicata* applies: (1) identity in parties; (2) identity in subject matter; (3) the issues are the same and relate to the subject matter; and (4) the capacities of the persons are identical in reference to both the subject matter and the issues between them. *Id.* Collateral estoppel

> bars relitigation of previously litigated issues and involves an analysis of four similar factors: (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.*
>
> *Polo Ranch Co. v. City of Cheyenne*, 2003 WY 15, ¶ 12, 61 P.3d 1255, [1259] (Wyo. 2003).
>
> Collateral estoppel is issue preclusion, while *res judicata* is claim preclusion. *Eklund v. PRI Environmental, Inc.*, 2001 WY 55, ¶ 15, 25 P.3d 511, [517] (Wyo. 2001).

Although this case involves the application of federal law, federal courts apply the same four prerequisites for collateral estoppel as Wyoming courts do. *See, e.g., Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation*, 975 F.2d 683, 687 (10th Cir. 1992). Therefore, collateral estoppel/issue preclusion is the appropriate doctrine to analyze. Herrera argues that the doctrine does not apply to him for the following reasons: 1) *Repsis* was overruled by *Mille Lacs*, and this change in the law prevents preclusion; 2) a change in the applicable facts prevents preclusion; 3) Herrera

was not a party or in privity with a party in the *Repsis* case; and 3) the issues in the two cases are not identical. The State asserts that collateral estoppel does bar Herrera's treaty rights defense, and its use here is justified by the facts and the nature of the treaty right at issue. The Court must therefore determine whether the factors of collateral estoppel/issue preclusion are present in this case, such that Herrera would be precluded from relitigating the validity of the off-reservation treaty hunting right.

(a) Whether the issue decided in the prior adjudication was identical with the issue presented in the present action

The State asserts that the primary issue in this case is identical to the primary issue in the *Repsis* case: the continued validity of the off-reservation treaty hunting right. Herrera argues that the issues in the *Repsis* case were not identical to the issues in this case. He admits that *Repsis* involved a ruling on the continued validity of the treaty-hunting right in the Crow Treaty. However, he argues that the issues are not identical, because "*Repsis* did not address the issue raised in this matter of the treaty-hunting right as retained and kept in force by two subsequently Congressionally (sic) ratified agreements." However, these "subsequently" ratified agreements were signed in 1891 and 1904. Hence, their existence was known when the *Repsis* case was decided. The fact that Hererra may be making a different argument for the enforceability of the treaty hunting right does not change the fact that the ultimate issue in the two

cases is identical.[3] The primary issue that Herrera is attempting to litigate is indistinguishable from the issue that was previously litigated in *Repsis*. The Court finds that the first prerequisite for the application of collateral estoppel has been met.

(b) Whether the prior adjudication resulted in a judgment on the merits

"Adjudication on the merits requires that the adjudication be necessary to the judgment." *Murdock*, 975 F.2d at 687 (citing *Block v. Comm'rs*, 99 U.S. 686, 693 (1878)). "[A] judgment of a court of competent jurisdiction is [as between the parties or their privies] everywhere conclusive evidence of every fact upon which *it must necessarily have been founded*." *Id.* (emphasis in original). In *Repsis*, the Crow Tribe sought a declaratory judgment asking the court to determine the validity of the off-reservation treaty hunting right. The federal district court for the State of Wyoming found that the right was intended to be temporary in nature, and it was no longer valid. Thus, the validity of the off-reservation treaty hunting right was necessary to that judgment. Thus, the Court finds that this prerequisite has also been met.

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[3] Herrera also argues that the issues in this case are not identical to those in *Repsis*, because the conservation necessity issue involved a different State regulation. However, the circuit court's ruling on the conservation necessity issue was an alternative holding in the event that the treaty rights do still exist. If the treaty rights do not exist, then it is immaterial whether the State's regulation met the conservation necessity standard. Therefore, the Court's ruling the treaty hunting right issue makes it unnecessary to address the conservation necessity issue.

(c) Whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication

Although Herrera was not a party to the *Repsis* case, the Crow Tribe was a party. Thus, the Court must decide if Herrera is in privity with the Crow Tribe.[4] The Supreme Court has long recognized that "'in certain limited circumstances,' a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the suit." *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (quoting *Richards v. Jefferson Cnty.*, 517 US 793, 798 (1996)) (alterations in original). Although privity does not have a set definition in federal law, the Ninth Circuit has set forth a three-factor test for determining whether an absent party's interests are being adequately represented:

> Consequently, we will consider three factors in determining whether existing parties adequately represent the interests of the absent tribes: whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments; whether the party is capable of

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[4] More recent cases have moved away from using the term "privies," and it was abandoned in the Second Edition of the Restatement. However, these cases still focus on whether the person bringing the second suit had a direct financial or proprietary interest in the previous suit and are now "seeking to redetermine issues previously resolved." *See, e.g., Montana v. United States*, 440 U.S. 147, 154 (1979). In this case, both the Crow Tribe and Herrera had a direct interest in having the treaty rights declared to be valid in the *Repsis* case, and they are now seeking to have this issue redetermined in this case.

> and willing to make such arguments; and whether the absent party would offer any necessary element to the proceedings.

U.S. ex rel. Yankton Sioux Tribe v. Gambler's Supply, Inc., 925 F. Supp. 658, 666 (D.S.D. 1996) (citing *Shermoen v. U.S.*, 982 F.2d 1312, 1318 (9th Cir. 1992) (citations omitted); *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995)).[5]

In this case, the three factor test set out by the Ninth Circuit is clearly satisfied. The Treaty was made with the Crow Tribe, and they had an equal, if not greater, interest than Herrera in having the off-reservation treaty hunting rights declared valid. The Tribe was represented by competent legal counsel, who was willing and capable of making arguments in favor of the Treaty's validity. The Tribe wanted the right to be declared valid for all of its members, and Herrera's presence in the *Repsis* case would not have offered any element necessary to the proceeding.

Further, federal courts have recognized that treaty hunting and fishing rights inure to the benefit of the Tribe as a whole:

> Each tribe bargained as an entity for rights which were to be enjoyed communally . . . . Individual Indians had no individual title to property, but participated in the communal rights of the tribe. "The

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[5] In *Gambler's Supply*, the South Dakota federal district court found that *res judicata* precluded the Yankton Sioux Tribe from bringing a *qui tam* action against a casino management company, because a tribal member had previously brought her own *qui tam* action against the company. The court found that the tribe and its member were in privity with each other. 925 F. Supp. at 670.

> right of the individual Indian is, in effect, a right of participation similar in some respects to the right of a stockholder in the property of the corporation . . . . The right to fish was one such community property right pertaining to the tribe."

United States v. Washington, 520 F.2d 676, 688 (9th Cir. 1975) (quoting F. Cohen, *Handbook of Federal Indian Law* (1942)). Herrera only has an off-reservation treaty hunting right if the Crow Tribe has such a right. If the Tribe no longer has these rights, its members do not have them either. In *Repsis*, the Tribe's interests were aligned with Herrera's, and the Tribe understood itself to be acting in a representative capacity for its members. *See Taylor*, 553 U.S. at 900 (holding that the representation of a nonparty is adequate when the interests of the nonparty and her representative are aligned, and the party understood herself to be acting in a representative capacity). Therefore, the Court finds that Herrera is in privity with the Crow Tribe, and the third prerequisite is also satisfied.

(d) Whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding

The full and fair inquiry often focuses on whether there were significant procedural limitations in the prior proceeding, whether the party to the prior action had the incentive to litigate the issue fully, and whether effective litigation was limited by the nature or relationship of the parties. *Murdoch*, 975 F.2d at 689 (citing *Si-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507,

1521 (10th Cir. 1990)). The *Repsis* case was resolved through summary judgment. Federal case law makes clear that "a plaintiff has a full and fair opportunity to litigate if it is allowed to submit evidence to defeat a motion for summary judgment. *Matosantos Commercial Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1211 (10th Cir. 2001) (citing *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 421 F.2d 1313, 1319 (5th Cir.1970) ("It would be strange indeed if a summary judgment could not have collateral estoppel effect."); 18 Charles Alan Wright, *Federal Practice and Procedure* § 4419 (1981) ("It is clear enough that issue preclusion generally is appropriate if some effort is made to litigate the issue, but the evidence introduced is held insufficient to can-y the burden of persuasion or even the burden of production.")). A full and fair opportunity to litigate an issue also includes some opportunity to appeal an adverse decision. *Bell v. Dillard Dept. Stores, Inc.*, 85 F.3d 1451, 1456 (10th Cir. 1996). After consideration of these factors, the Court concludes that the Crow Tribe, which is in privity with Herrera, had a full and fair opportunity to litigate the issue in *Repsis*. The Tribe had an opportunity to present evidence to defeat the summary judgment motion, and it did appeal the federal district court's decision. When the district court's decision was affirmed by the Tenth Circuit, the Tribe sought a writ of certiorari to the Supreme Court of the United States, which was ultimately denied. The Court also finds that the Tribe had an incentive to litigate the issue fully, and effective litigation was not limited by the nature or relationship of the parties. Thus, the Court finds that the fourth prerequisite is also satisfied.

II. Exceptions to the Doctrine

Collateral estoppel is largely a "judge-made" doctrine and several exceptions have been found to exist. *Heck v. Humphrey*, 512 U.S. 477, 488 n. 9 (1994) (citing Hart and Wechsler's *The Federal Courts and the Federal System* 1598 (3d ed. 1988)). These exceptions are set out in Restatement (Second) of Judgments § 28 (1982), which reads:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> > (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
> >
> > (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
> >
> > (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or
>
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Herrera argues that the *Mille Lacs* case constitutes an intervening change in the applicable legal context since *Repsis* was decided, such that a new determination is necessary. The State contends that *Mille Lacs* did not overrule *Repsis*, so there has been

no change in the law, and this exception does not apply in this case.

The *Repsis* decision was largely based on the holding of *Ward v. Race Horse*, 163 U.S. 504 (1896). In *Race Horse*, the Supreme Court of the United States was tasked with determining whether the treaty made by the United States with the Bannock Indians gave them the right to exercise an off-reservation hunting privilege within the limits of the state of Wyoming in violation of its laws. *Id.* at 507. A member of the Bannock Tribe had been arrested on charges of killing seven elk in violation of Wyoming's game laws. The Supreme Court looked at the language of the treaty, which read:

> But they shall have the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the white and Indians on the borders of the hunting districts.

The Supreme Court found that the treaty hunting right given by the treaty was "temporary and precarious" in nature. *Id.* at 510. The right was "essentially perishable, and intended to be of a limited duration." *Id.* at 515. The Supreme Court also found that the act that admitted Wyoming to the Union was inconsistent with the rights granted in the treaty, and if it remained, Wyoming would not have been admitted as an "equal member" of the Union. *Id.* at 514. This so called "equal footing" doctrine has subsequently been rejected by numerous cases. However, the "temporary and precarious" doctrine remained alive and well.

In *Repsis,* the Tenth Circuit Court of Appeals found that the off-reservation hunting right found in Article 4 of the Crow Treaty was also "temporary and precarious." 73 F.3d at 988. It made this conclusion in part on the fact that the language in the two treaties is identical. *Id.* at 987. The *Repsis* court concluded that "[t]he Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union." *Id.* at 992 (citing *Race Horse,* 163 U.S. at 514). The *Repsis* court also pronounced an alternative reason for affirming the district court's ruling; the creation of the Big Horn National Forest resulted in the "occupation" of the land, extinguishing the off-reservation hunting right. *Id.* at 993. As a third reason for affirmance, the court also concluded that "there was ample evidence in the record to support a finding that the regulations at issue were reasonable and necessary for conservation." *Id.*

In *Mille Lacs,* the Mille Lacs Band of Chippewa Indians had filed a declaratory judgment action seeking a determination that their treaty rights were still in effect. An 1837 treaty had given the Tribe the right to hunt, fish, and gather wild rice on territory ceded to the United States during the pleasure of the president. 526 U.S. at 177. In 1850, President Zachary Taylor issued an executive order stating that the privileges granted to the Chippewa Indians were revoked. *Id.* at 179. However, as of 1855 the federal officials in Minnesota were still recognizing the Chippewa's rights to hunt and fish. *Id.* at 182. Another treaty was signed in 1855, but it did not explicitly mention whether the hunting and fishing rights were still in effect. *Id.* at 184. Minnesota was admitted to

the Union three years later, and the admission act was also silent with respect to Indian Treaty Rights. *Id.* at 185. The Tribe filed suit in 1990 to clarify their rights under the various treaties. The Supreme Court of the United States again rejected the equal footing doctrine of *Race Horse*. However it acknowledged that the *Race Horse* court had "also announced an alternative holding: The treaty rights at issue were not intended to survive Wyoming's statehood." *Id.* at 206. The Court then went on to say that "[t]he 'temporary and precarious' language in *Race Horse* is too broad to be useful in distinguishing rights that survive statehood from those that do not." *Id.* However, the Supreme Court did not completely reject the temporary and precarious doctrine. Rather it stated that "[t]he focus of the *Race Horse* inquiry is whether Congress . . . intended the rights secured by the 183 7 Treaty to survive statehood." *Id.* at 207. It then concluded that unlike the treaty in *Race Horse*, "there [was] no fixed termination point to the 1837 Treaty Rights." The Supreme Court went on to say:

> The Treaty in *Race Horse* contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States; the happening of these conditions was "clearly contemplated" when the Treaty was ratified. By contrast the 1837 Treaty does not tie the duration of the rights to the occurrence of some clearly contemplated event.

Id. at 207. While the *Mille Lacs* court stated that *Race Horse* did not compel the conclusion that Minnesota's admission to the Union extinguished Chippewa

usufructuary rights, it affirmed the concept that certain treaties, like the one in *Race Horse* were intended to terminate upon the happening of a "clearly contemplated" event. Thus, contrary to Herrera's contention, *Mille Lacs* did not overturn *Race Horse* or *Repsis*.[6] Rather, it affirmed the concept that a court interpreting a treaty must determine if the rights reserved in the treaty were intended to be perpetual or if they were intended to expire upon the happening of a "clearly contemplated event." *Mille Lacs* did not change the fundamental legal principles applicable to the interpretation of treaties. When the legal framework is unchanged, "normal rules of preclusion should operate to relieve the parties from redundant litigation . . . ." *Montana v. United States*, 440 U.S. 147, 162 (1979).

In addition, although preclusion does not generally attach to pure questions of law, it does generally apply to determinations that mingle facts with conclusions of law. 18 Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Juris.* § 4425 (3d ed. 2017). Preclusion generally is appropriate if both the first and second action involve application of the

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[6] The Court notes that Chief Justice Rehnquist opined in his dissent that *Mille Lacs* "effectively overrules *Race Horse sub silientio*." 526 U.S. at 219 (Rehnquist, C.J., dissenting). However, this Court has careful reviewed the majority opinion, and cannot agree with this assertion. The *Mille Lacs* Court clearly rejected the equal footing doctrine of *Race Horse*, and while it arguably narrowed the "temporary and precarious" doctrine, it did not overrule it. Instead, the *Mille Lacs* Court held that courts should look to see whether the rights granted in a treaty were intended to terminate upon the happening of a clearly contemplated event, as the *Race Horse* Court had done.

same principles of law to a historic fact setting that was complete by the time of the first adjudication. *Id.* The determination of the validity of the off-reservation treaty right is a mixed question of law and fact, and it involves the application of the same principles of law to historic facts that were complete by the time of the first adjudication.[7] The Supreme Court of the United States has held that although *res judicata* and estoppel do not apply to pure questions of law, the doctrines do apply when a fact, question, or right has been adjudicated in a previous action, even if that determination was based on an erroneous application of the law:

> The contention of the government seems to be that the doctrine of *res judicata* does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely

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[7] Herrera also argues that the total population of elk has changed since *Repsis*. If the *Reps is* case had decided that the Treaty rights were no longer valid because game could no longer be found in the area ceded by the Crow Tribe, the change in the elk population might be relevant to the issue of preclusion. However, this was not the basis for *Repsis's* holding. In addition, the total population of elk would be relevant for determining whether the regulation met the conservation necessity. However, this inquiry is only necessary if the Court found that the treaty hunting rights were valid. Because the Court concludes that the treaty rights are not valid, it does not need to reach the conservation necessity issue.

> because the parties are the same in both cases. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based. *See Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 291, 26 S. Ct. 252, 50 L. Ed. 447; *United States v. California & Ore Land Co.*, 192 U. S. 355, 358, 24 S. Ct. 266, 48 L. Ed. 476; *Scotland County v. Hill*, 112 U.S. 183, 187, 5 S. Ct. 93, 28 L. Ed. 692; *Southern Minnesota Ry. Ext. Co. v. St. Paul & S. C. R. Co.*, 55 F. 690, 695, 696, 5 C. C. A. 249; *Pittsford v. Chittenden*, 58 Vt. 49, 57, 3 A. 323; Bigelow on Estoppel (6th Ed.) p. 112.

United States v. Moser, 266 U.S. 236, 242 (1924) (emphasis added). Therefore, because the Crow Tribe's rights under the Crow Treaty were previously adjudicated in *Repsis*, that right cannot be disputed in the present action, even if the determination was reached through an erroneous application of the law.

III. Offensive Issue Preclusion in a Criminal Case

The Court recognizes that collateral estoppel/issue preclusion is most often applied in civil cases, and that its use in criminal cases is rare. Federal courts have stated that "while 'wise public policy and judicial efficiency' may be sufficient reasons

to apply collateral estoppel in civil cases, they do not have the same weight and value in criminal cases." *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1244 (10th Cir. 1998). The Wyoming Supreme Court has yet to tackle this issue, but is has held that collateral estoppel can apply in a civil action to an issue that was litigated in a criminal action. *See Bowen v. State, Dep't of Transp.*, 2011 WY 1, ¶ 11-12, 245 P.3d 827, 830-31 (Wyo. 2011) (holding that collateral estoppel precluded the appellant in an administrative action from relitigating the question of whether his breath tests results were legally obtained when that issue had previously been adjudicated in a criminal case). Some federal courts have also allowed the government to use a judgment in a criminal case following a guilty plea to collaterally estop a defendant from relitigating an issue in a subsequent criminal case, while others have held that doing so violates due process. *Compare United States v. Gallardo-Mendez*, 150 F.3d at 1244, *with Hernandez-Uribe v. United States*, 515 F.2d 20, 21-22 (8th Cir. 1975), *and United States v. Bejar-Matrecios*, 618 F.2d 81, 83-84 (9th Cir. 1980).

It appears that the applicability of collateral estoppel in criminal cases turns on whether the doctrine would preclude the defendant from challenging a substantive element of the charged offense. Some courts are allowing the use of collateral estoppel when it "affects a judge's pretrial ruling and does not necessarily eliminate a jury's consideration of substantive elements of the indicted offense." *State v. Hewins*, 409 S.C. 93, 111, 760 S.E.2d 814, 823 (2014). Accordingly, some courts have declined to adopt a blanket prohibition of the offensive use of collateral

estoppel in this context, provided that the requirements of collateral estoppel are met. *Id.* (citing 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.2(g) (5th ed. Supp. 2013); Anne Bowen Poulin, *Prosecution Use of Estoppel and Related Doctrines in Criminal Cases: Promoting Consistency, Tolerating Inconsistency*, 64 Rutgers L. Rev. 409, 432-40 (Winter 2012)).

Further, at least one state court has allowed collateral estoppel to be used in a criminal case when the issue was previously adjudicated in a civil case. In *Moses v. Department of Corrections*, the Michigan Court of Appeals upheld the use of collateral estoppel to preclude a defendant from challenging the court's jurisdiction to prosecute him for a crime he asserted had been committed in "Indian Country." 274 Mich. App. 481, 503-04, 736 N.W.2d 269, 282-83 (2007). A previous decision had held that the "swampland" where the crime had been committed was not part of the Reservation, but was actually part of the State of Michigan. The court held that this decision precluded the defendant from challenging the court's jurisdiction in his criminal case:

> Second, the prosecutor correctly points out that in *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1413-1414 (C.A.8, 1983), the Eighth Circuit Court of Appeals found that a commission decision, under the doctrine of collateral estoppel, precluded a tribe from litigating title in an action against a private party. Notwithstanding the prosecutor's cursory treatment of this issue, we conclude that there is merit in the

prosecutor's position that the doctrine of collateral estoppel applies. Collateral estoppel is a rule of issue preclusion. It bars the "relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v. Orion Twp.*, 269 Mich. App. 527, 530, 711 N.W.2d 438 (2006). But the absence of mutuality does not always preclude application of collateral estoppel. *Monat v. State Farm Ins. Co.*, 469 Mich. 679, 688, 677 N.W.2d 843 (2004). In *Monat, supra* at 695, 677 N.W.2d 843, our Supreme Court held that, where collateral estoppel is asserted against a party who already had a full and fair opportunity to litigate the issue, mutuality is not required. Although plaintiff was not a party to the matter before the Indian Claims Commission, he claims rights as a member of the Indian tribe that was a party. "To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair v. Michigan*, 470 Mich. 105, 122, 680 N.W.2d 386 (2004). Because plaintiff is claiming rights as a member of the Saginaw Chippewa Indian Tribe, we find that the requisite privity exists to apply the doctrine of collateral estoppel in this case.

The fact that the instant case is a criminal case should not preclude application of the doctrine. Collateral estoppel cannot be invoked to preclude a defendant from contesting an essential element of a criminal charge. *People v. Goss (After Remand)*, 446 Mich. 587, 600, 521 N.W.2d 312 (Levin, J.), 610-611 (Brickley, J.); 446 Mich. 587, 521 N.W.2d 312 (1994). But because the instant issue involves only a jurisdictional challenge to the Isabella County Prosecutor's authority to prosecute plaintiff in the criminal case, we conclude that it is permissible under *Monat*, *supra* at 695, 677 N.W.2d 843, for the prosecutor to make defensive use of collateral estoppel to preclude relitigation of an issue previously litigated by plaintiffs Indian tribe regarding whether the swampland was part of the reservation. The doctrine, as applied, promotes the efficient administration of justice and ensures more consistent judicial decisions. *Id.* It also furthers the purpose of the Indian Claims Commission Act by according finality to the Indian Claims Commission's determinations regarding Indian claims. *Dann*, *supra* at 45, 105 S. Ct. 1058. Applying the rule of law established in *Bennett* to the commission's finding, it follows that the swampland granted to the state of Michigan is not "Indian country" as a matter of law because it is not "within the limits of any Indian reservation under the jurisdiction of the United States Government," as required by 18 U.S.C. 1151.

Moses v. Dep't of Corr., 274 Mich. App. at 503-04, 736 N.W.2d at 282-83.

In this case, the use of collateral estoppel would not preclude Herrera from contesting an essential element of the criminal charge. Herrera was claiming a treaty based immunity from prosecution. This issue was civil in nature, and it did not present questions of fact for a criminal jury to weigh in deciding his guilt or innocence. Applying collateral estoppel would not eliminate the jury's consideration of the substantive elements of the offense. The State still had to prove all of the elements of the charged crimes beyond a reasonable doubt. Thus, the Court finds that the application of collateral estoppel in this case does not violate Herrera's right to due process. Therefore, the Court concludes that collateral estoppel should apply to preclude Herrera from attempting to relitigate the validity of the off-reservation treaty hunting right that was previously held to be invalid in the *Repsis* case. Although the circuit court did not base its holding on collateral estoppel, it is a legal ground appearing in the record, and this Court can affirm the circuit court's decision on this basis.

IV. Alternative Reason for Affirmance

Even if collateral estoppel did not apply in this case, there are other grounds appearing in the record that support affirming the circuit court's decision. Under the Supremacy Clause, treaties are binding on the states until Congress limits or abrogates the treaties. *See, e.g., Antoine v. Washington*, 420 U.S. 194, 201-02 (1975). Treaties are contracts, and principles of contract law apply when a court is tasked with interpreting a treaty. As with all contracts, the

interpretation begins with the text of the treaty. *Air France v. Saks*, 470 U.S. 392, 396-97 (1985). The goal is to determine the intent of the parties. *Washington v. Washington State Commercial Passenger Fishing Vessel*, 443 U.S. 658, 675 (1979). However, unlike most contracts where parol evidence is not considered, "the history of the treaty, the negotiations, and the practical construction adopted by the parties should also be considered. *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943). There should be a fair appraisal of the purpose of the treaty negotiations, the language of the treaties, and this Court's prior construction of the treaties." *Fishing Vessel*, 443 U.S. at 675. *Race Horse* applied these cannons of construction when interpreting the Bannock Treaty. 163 U.S. at 508. The Court opined:

> Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with the language and in conflict with an act of Congress, and also destructive of the rights of one of the States.

Id. at 516. After considering the language of the treaty, the *Race Horse* court concluded that the rights granted in the treaty were temporary in nature, and they were not intended to survive Wyoming statehood. *Id.* at 515. Similarly, the *Repsis* court discussed these cannons of construction when interpreting the Crow Treaty. 73 F.3d at 992. After considering the language

of the Crow Treaty, the *Repsis* court found that "[t]he Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union. Therefore the tribe and its members are subject to Wyoming's game laws and regulations regardless of whether the regulations are reasonable and necessary for conservation." *Id.* at 992-93. The *Repsis* court also alternatively held that the treaty rights were no longer valid, because "the creation of the Big Horn National Forest resulted in the 'occupation' of the land." *Id.* at 993.

The circuit court found itself to be "bound" by the decision in the *Repsis* case. The State concedes that while the Supreme Court of the United State's interpretation of federal law is binding on state courts, neither the Supremacy Clause nor any other principle of federal law requires that a state court's interpretation of federal law give way to a lower federal court's interpretation. *See Lockhart v. Fretwell*, 506 US 364, 376 (1993) (Thomas, J. concurring). Therefore, *Repsis* was not binding authority. However, where no decision on a particular issue has been rendered by the Supreme Court of the United States, state courts "are free to adopt decisions of the lower federal courts if [they] find their analysis and conclusions persuasive and appropriate for [their] jurisprudence." *Abela v. Gen. Motors Corp.*, 469 Mich. 603, 606-607, 677 N.W.2d 325 (2004); *see also Evan v. Thomson*, 518 F.3d 1, 8 (1st Cir. 2008). Although there was binding authority on the invalidity of the Bannock Treaty, other than through collateral estoppel as discussed above, there was no binding decision on the validity Crow Treaty. However, the circuit court was presented with the *Repsis* case, which had squarely

addressed the interpretation of the Crow Treaty. The circuit court was free to adopt that decision if it found it to be persuasive and appropriate. The circuit court did adopt the analysis and conclusions of the *Repsis* case, and this Court finds that it was appropriate to do so.

Herrera's primary argument is that the circuit court should not have found *Repsis* to be persuasive, because it was overruled by *Mille Lacs*. The circuit court rejected this argument, and as discussed above, this Court also concludes that *Mille Lacs* did not overrule *Repsis*. Rather, *Mille Lacs* reaffirmed the principle that the court must look at the language in the treaty to determine whether it was intended to be perpetual or if it was intended to terminate at the occurrence of a "clearly contemplated" event. The *Repsis* court applied this principle and determined that the off-reservation treaty hunting right in the Crow Treaty was no longer valid. It was therefore proper for the circuit court to adopt the reasoning in the *Repsis* decision, and bar Herrera from asserting the invalidated treaty hunting right as a defense to the criminal prosecution.

NOW, THEREFORE, IT IS HEREBY ORDERED that the circuit court's orders and the *Judgment and Sentence* are AFFIRMED.

Dated this [handwritten: 25] day of [handwritten: April], 2017.

Certificate of Clerk of the District Court. The above is a true and correct copy of the original instrument

[handwritten: signature]
John G. Fenn
District Court Judge

which is on file or of record in this court.

Done this [handwritten: 25] day of [handwritten: April] 20[handwritten: 17] [handwritten: signature] Clerk

By ____ Deputy

Copies to:
Christopher LaRosa
Kyle Gray
Andrew A. Irvine
Andrew A. Irvine
Dennis M. Bear
Don't Walk

Appendix C

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL DISTRICT, SHERIDAN COUNTY, WYOMING

Nos. CT-2015-2687, CT-2015-2688

STATE OF WYOMING,

Plaintiff,

v.

CLAYVIN HERRERA,

Defendant.

On Appeal from the Fourth Judicial Circuit Court, Sheridan County, Wyoming

Filed: October 16, 2015

ORDER DENYING MOTION TO DISMISS, STRIKING EVIDENTIARY HEARING AND GRANTING THE STATE'S MOTION IN LIMINE

The defendant was cited in CT-2014-2687 for *Taking Antlered Big Game Animal Without A License or During a Closed Season* a violation of W.S. §23-3-102(d) and in CT-2015-2688 with *Accessory to Taking Antlered Big Game Animal Without A License or During a Closed Season* a violation of W.S. §23-6-205. Defendant pled not guilty and has moved for the dismissal of these citations under the Supremacy

Clause of the United States Constitution. The Court having reviewed federal and state law and multiple briefs and arguments submitted by both the defendant and the state finds, concludes and orders as follows:

Defendant asserts that he is a member of the Crow Tribe of Indians and pursuant to Article 4 of the Treaty with the Crows, 1868, has an off-reservation treaty hunting right to hunt in the Big Horn National Forest (BHNF.) He argues that because of the 1868 Treaty he has an unlimited, unregulated and unrestricted right to hunt in the BHNF. From the documents filed of record and the statements of counsel both the state and Defendant would require this Court to make a reinterpretation of the 1868 Treaty. The defendant has submitted multiple exhibits, affidavits and legal argument insisting that the 1868 Treaty was not interpreted or the interpretation is invalid. The state argues that the 1868 Treaty has been interpreted and that such interpretation is the precedence for this Court, but then demanded an evidentiary hearing on the issues. The decision on the matter of off-reservation treaty hunting rights is based in law and not in fact. No evidentiary hearing is warranted as the 1868 Treaty has been interpreted and that interpretation is the precedent followed by this Court in finding that the defendant does not have an off-reservation treaty hunting right.

This issue of off-reservation treaty hunting right is indistinguishable from the issue and arguments which were adjudicated in *Crow Tribe of Indians vs Respis*, 73 F.3d 982 (10th Cir. 1995). In that matter Thomas L. Ten Bear, a Crow Tribal member and

resident of Montana was cited on November 14, 1989, for a violation of W.S. §23-3-102(a) Taking an Elk without a Wyoming Hunting License. Mr. Ten Bear moved to dismiss the citation by arguing that he had an unrestricted right to hunt in the BHNF because that was "unoccupied" lands of the United States under Article 4 of the Treaty with the Crows, 1868. *Repsis* at 985. The motion to dismiss was denied. See State's Exhibit 31, ("Memorandum Decision & Order On Motion to Dismiss," *State v Ten Bear*, CT 8911-0239 July 17, 1990).[1] The issue ultimately was heard by the Tenth Circuit Court of Appeals and is precedent for this Court.

Not only does this Court agree, but also is bound by the Tenth Circuit's holding that Crow Tribe members do not have off-reservation treaty hunting rights anywhere within the state of Wyoming. That court found that the language in Article 4 of the 1868 Treaty was the same language that had previously been interpreted in *Ward vs. Race Horse,* 163 U.S. at 514, 16 S.Ct. 1076, 41 L.Ed. 244 (1896).[2] *Repsis* at 986-987. The *Race Horse* Court concluded that the hunting right reserved by the treaty was "perishable and intended to be of limited duration." *Id.* at 517. The *Repsis* Court agreed that the treaty language was temporary and that BHNF was "occupied land" which terminated the off-reservation treaty hunting right.

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[1] In The County Court of Sheridan County, Sheridan, Wyoming.

[2] Mr. Race Horse in 1895 was accused of killing seven elk on unoccupied public land of the United States in Uinta County in violation of state law. Mr. Race Horse argued that he had a right to hunt on those lands under the Treaty of February 24, 1869.

Repsis.[3] The Crow Tribe's right to hunt reserved in the 1868 Treaty with the Crows was temporary and is no longer a valid right.

The Defendant argues that *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) rejected and reversed the *Race Horse* decision. The defendant mischaracterizes what the *Mille Lacs* decision repudiated in *Race Horse*. The U.S. Supreme Court rejected the *Race Horse* "equal footing doctrine," that statehood alone would not terminate the off-reservation Treaty hunting rights. *Mille Lacs at 203-204*. That ruling had no effect on the *Repsis* decision and in fact the *Mill Lacs* Court further stated: "But this Court's cases have also recognized that Indian treaty-based usufructuary rights do not guarantee the Indians 'absolute freedom' from state regulation. *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S., at 765, n. 16, 105 S.Ct. 3420.." *Mill Lacs* at 204-205. Defendant does not have off-reservation treaty hunting rights and is subject to regulation by the state.

Moreover, if the Defendant had the off-reservation right to hunt, the state of Wyoming may regulate that right in the interest of conservation. The "conservation necessity" allows state imposed limitations on an Indian treaty rights. *See, e.g., Mille Lacs*, citing *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 398 (1968); *Washington v. Washington State Commercial Passenger Fishing*

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[3] The U.S. Supreme Court denied certiorari in *Crow Tribe of Indians vs Respis, cert. denied*, 517 U.S.1221, 116 S. Ct. 1851, 134 L.Ed.2d 951 (1996).

Vessel Assn., 443 U.S. 658, 682 (1979); *Antoine v. Washington*, 420 U.S. at 207-208 (1975). In fact, Senior Circuit Judge Barrett in the *Repsis* decision wrote: "On appeal, the Tribe recognizes its treaty hunting and fishing rights are subject to state regulation 'in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.' *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 398, 88 S.Ct. 1725, 1728, 20 L.Ed.2d 689 (1968) (*Puyallup I*)." *Repsis* at 988. The defendant's arguments that closing the elk hunting season in January discriminates against the off-reservation treaty hunter fails in the legal argument espoused by the defendant. Defendant is subject to the state regulations and those regulations are applied to everyone equally.

Defendant further argues that the state cannot prove the "conservation necessity," as if those efforts were discontinued the elk population would continue unaffected by unlimited hunting. In fact, even the Crow Tribe does not allow such unrestricted hunting in that part of the Big Horn Mountains which are within the Crow Reservation. There are conservation efforts on the reservation. *See* State's exhibit 19, (Article 12, *The 2005 Crow Law and Order Code*). It is unreasonable for the defendant to believe or to even argue that he and other members of the Crow Tribe may hunt any game within the BHNF without restriction. *Repsis* at 992. If not for the continuing conservation efforts there would be no game to hunt.

Further, if the Crow Tribe had off-reservation treaty hunting rights, the tribal government recognizes the need for conservation and regulation of

that hunting privilege. The Crow Tribe Legislature passed a joint resolution in 2013 to include regulation of off-reservation treaty hunting rights. *See* Defendant's affidavit of Timothy P. McCleary, Ph.D. exhibit 9.[4] This type of regulation is already practiced by other Indian Tribes in this state and others. *See,* State's exhibits 25-27 *(Shoshoni and Arapaho Tribes Fish and Game Code,* Title XVI 2004; Wolf Management Plan for the Wind River Reservation Shoshoni and Arapaho Tribal Fish and Game Dept.; 1982 Plan for the Management of Wildlife on the Wind River Indian Reservation.) More specifically the Indian tribes of the Great Lakes area have regulation of off-reservation treaty hunting, gathering and trapping. *See,* Great Lakes Indians Fish and Wildlife Commission as to off-reservation treaty hunting at http://www.glifwc.org/Regulations/regulations.html. Conservation is necessary and is a continuing necessity.

CONCLUSION

From *Repsis* we know that the off-reservation treaty hunting rights for the Crow Tribe no longer exist. Those hunting rights were temporary and ended upon the occupation of the BHNF. The Defendant has offered no valid legal argument that the interpretations of the hunting rights language in Article 4 of the 1869 Treaty is in error. That treaty has been interpreted and this Court will follow that interpretation.

---

[4] This Court could find no evidence that such amendments to Article 12 of the Crow Law and Order Code have been made.

Even if the Defendant can persuade a higher court to find differently, the right to hunt on or off the reservation would be regulated as to when, where and how. Elk migrate and presumably they migrate in the Big Horn Mountains between the BHNF and the Crow Reservation. *See, e.g. Repsis* (the issue regarding a game fence which arguably was an attempt to keep the elk from moving onto the Crow Reservation from Wyoming). The Crow Tribe conservation efforts regulate hunting on the reservation and would regulate hunting off of the reservation if that right existed.

Moreover, it is this Court's belief that the makers of the 1868 Treaty were contemplating the off-reservation treaty hunting rights for tribal members for subsistence by traditional means. The Supreme Court of Washington believed, as does this Court, that a "tribe never contemplated a right to hunt beyond what naturally existed; and they have no right to hunt at the expense of the state." *Dept of Game v. Puyallup Tribe, Inc.*, 548 P.2d at 1070-72. The 1868 Treaty writers could not have foreseen high powered, scoped rifles which make taking game much easier. Nor would they have allowed such hunting rights for the purpose of taking antlered elk heads as trophy. Without regulation the high powered weaponry could assist a hunter or hunters in decimating a herd of elk within a few minutes. Conservation is a necessity and the defendant, whether a Crow Tribal member or not, is subject to regulation. A hunter is regulated by the *Crow Tribe Law and Order Code* when hunting in the Big Horn Mountains on the Crow Reservation in Montana. He is likewise subject to Wyoming Game

and Fish regulations when hunting in the Big Horn Mountains located within the BHNF in Wyoming.

Simply put, if not for the conservation efforts by the state governments, the federal government and the Indian tribes there would be no game to hunt. It is only the efforts of the State of Wyoming and the Crow Fish and Game Department that have caused the elk population to be sustainable in the BHNF and on that portion of the Big Horn Mountains that are located in Montana.

IT IS THEREFORE ORDERED that the defendant's motion to dismiss is DENIED.

IT IS FURTHER ORDERED that the evidentiary hearing scheduled for November 16-17, 2015 is hereby stricken and a pretrial order will issue.

IT IS FURTHER ORDERED that the State's Motion in Limine filed on August 20, 2015 is GRANTED.

Dated this 16th day of October 2015.

[handwritten: signature]
Judge of the Circuit Court

[handwritten: scan 10-16-15 nv]

cc: ✓ Christopher LaRosa
✓ Kyle Gray

Appendix D

U.S. Const. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the in the Constitution or Laws of any State to the Contrary notwithstanding.

Appendix E

Treaty with the Crow Indians, 15 Stat. 649 (1868)

. . .

Article 4. The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

. . .

Appendix F

Act to Repeal Timber-Culture Laws, 26 Stat. 1095 (1891)

. . .

Sec. 10. That nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes, and the proceeds thereof to be placed in the Treasury of the United States; and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements except as provided in section 5 of this act.

. . .

Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

. . .

Appendix G

Presidential Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897)

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas, it is provided by section twenty-four of the Act of Congress, approved March third, eighteen hundred and ninety-one, entitled, "An act to repeal timber-culture laws, and for other purposes", "That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof";

And whereas, the public lands in the State of Wyoming, within the limits hereinafter described, are in part covered with timber, and it appears that the public good would be promoted by setting apart and reserving said lands as a public reservation;

Now, therefore, I, Grover Cleveland, President of the United States, by virtue of the power in me vested by section twenty-four of the aforesaid Act of Congress, do hereby make known and proclaim that there is hereby reserved from entry or settlement and set apart as a Public Reservation all those certain tracts, pieces or parcels of land lying and being situate

in the State of Wyoming, and within the boundaries particularly described as follows; to-wit:

. . .

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and all mining claims duly located and held according to the laws of the United States and rules and regulations not in conflict therewith;

Provided, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing, settlement or location was made.

Warning be hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation.

In witness whereof, I have hereunto set my hand and cause the seal of the United States to be affixed.

Done at the City of Washington this 22d day of February, in the year of our Lord one thousand, eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

GROVER CLEVELAND

By the President:

RICHARD OLNEY

Secretary of State.

RECORD AND BRIEFS

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SUPREME COURT, U.S.

No. 17-532

In The Supreme Court of the United States

CLAYVIN HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Wyoming, Sheridan County

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In 1995, the United States Court of Appeals for the Tenth Circuit held that the Act admitting Wyoming into the Union, the occupation of the Bighorn National Forest, and the need to regulate elk harvest to conserve the species precluded members of the Crow Tribe from hunting in Wyoming without complying with Wyoming's hunting regulations. *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 992 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996) (No. 95-1560). Petitioner Clayvin Herrera killed elk in violation of Wyoming's game laws in 2014. During his misdemeanor prosecution in the state circuit court, that court held Herrera could not assert the Crow Tribe's expired Treaty hunting right as a defense. On appeal to the state district court, that court held that the Tenth Circuit's final decision against the Crow Tribe collaterally estopped Herrera from asserting tribal hunting rights as a defense to his prosecution.

The question presented is:

Whether the doctrine of collateral estoppel precludes Herrera from relitigating the Crow Tribe's hunting rights within Wyoming.

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INTRODUCTION

In 1996, this Court denied the Crow Tribe's petition for a writ of certiorari on the exact treaty hunting issue presented in this case. *See Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996) (No. 95-1560). Twenty-two years later, Petitioner Clayvin Herrera asks this Court to review the Tenth Circuit's interpretation of the 1868 Treaty with the Crows, 15 Stat. 649 (1868).

Although a final judgment bars his request, Herrera asks this Court to ignore the procedural bar of collateral estoppel and reinterpret the Treaty. Pet. 15. But collateral estoppel is a threshold issue that this Court considers first, it is the only issue ripe for review, and it does not meet this Court's criteria for certiorari.

Herrera suggests that the final decision reached twenty-two years ago need not prevent this Court from reinterpreting the Treaty. Pet. 15. But the content of the Treaty does not dictate whether the state district court should have reached the decision it did: precluding Herrera from relitigating the continuing validity of the Crow Tribe's hunting rights within Wyoming. Instead, the Court merely must consider whether *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), changed the legal context in which *Repsis* was decided. The state district court properly concluded that it did not.

Before this Court reinterprets the Treaty, it must conclude that Herrera is not estopped from relitigating the Crow Tribe's hunting right. Herrera has not even

presented this question for review by this Court. Moreover, because of this procedural obstacle, this Court lacks the record it seeks in a case such as this. When it interprets an Indian treaty, this Court examines the written words in light of the treaty's history, negotiations, and the practical construction adopted by the parties. *See, e.g.*, *Mille Lacs*, 526 U.S. at 196 (citations omitted). The circuit court that tried the misdemeanor charge did not allow the parties to submit such evidence after Herrera sought a ruling as a matter of law. That court also did not allow the parties to submit evidence on whether the Bighorn National Forest is occupied or whether Wyoming's regulations are reasonable and necessary for conservation. Accordingly, the record here is ill-suited for this Court to resolve the question posed by Herrera's petition, even if it was ripe for resolution.

This case presents no error in need of correction, no split of authority in need of reconciliation, and no issue of overriding public importance in need of resolution. The hunting rights of the Crow Tribe and its members in Wyoming have been settled by the federal courts for almost a quarter of a century. Nor does this case provide a clean vehicle to revive a previously-adjudicated and long-terminated hunting right, because the record in this case related to the Treaty is nonexistent. This Court should deny Herrera's petition.

STATEMENT OF THE CASE

I. Legal Background

On May 7, 1868, the Crow Tribe and the United States agreed to the Treaty with the Crows. *See* 15 Stat. 649 (1868). Article 4 of the Treaty provides, in relevant part: "they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." *Id.* Two months later, the United States, the Eastern Band of Shoshone, and the Bannock Tribe of Indians agreed to identical language in the Fort Bridger Treaty. *See* 15 Stat. 673 (1869).

Wyoming entered the Union in 1890, and shortly thereafter, Race Horse, a member of the Bannock Tribe of Indians, claimed he had the right to hunt on the unoccupied lands of the United States in Wyoming under the Fort Bridger Treaty of 1869. *Ward v. Race Horse*, 163 U.S. 504, 507 (1896). The Court disagreed and held that the Bannock Tribe's hunting right was extinguished in Wyoming. *Id.* at 515-16. The Court's opinion discussed the hunting districts referenced in the Treaty, and determined that the terms of the Treaty did not authorize the continued enjoyment of the right to kill game because the Wyoming territory ceased to be part of the hunting districts and had come within the authority and jurisdiction of the State of Wyoming. *Id.* at 509. The Court determined that the Treaty hunting right was incompatible with the Act admitting Wyoming into the Union under the equal footing doctrine.

Id. at 514. The Court also recognized that Congress had the power to create rights during the existence of a territory "which are of such a nature as to imply their perpetuity." *Id.* at 515. But, interpreting the specific language and context of the Fort Bridger Treaty, the Court held the Bannock's treaty hunting right was "temporary and precarious," "essentially perishable, and intended to be of a limited duration" such that it was not intended to survive statehood. *Id.* at 510-15.

Nearly one hundred years later, the Crow Tribe challenged Wyoming's enforcement of its game laws against a tribal member, claiming the Tribe retained the right to hunt in the unoccupied lands of the United States, including the Bighorn National Forest. *Repsis*, 73 F.3d at 986. In support of its claim, the Tribe argued this Court had overruled, repudiated, and disclaimed each of the legal doctrines applied in *Race Horse*, including the equal footing doctrine. *Id.* at 988. The Tribe asserted that the equal footing doctrine was a "major premise" of the Court's decision in *Race Horse*. *Id.* at 990. The Tenth Circuit disagreed. It noted that the equal footing doctrine "does not prevent the United States from creating a right in a territory which would be binding on the state upon its admission into the Union." *Id.* at 991. And, "[i]n *Race Horse*, the Court was fully aware of Congress' power to create binding continuing rights." *Id.* But Congress did not convey a perpetual right in the Fort Bridger Treaty. *Id.* at 992. Instead "the privilege given was temporary and precarious." *Id.*

The Tenth Circuit noted that the language in the Fort Bridger Treaty at issue in *Race Horse* was identical to the language contained in Article 4 of the Treaty with the Crows. *Id.* at 987. It also noted *Race Horse*'s careful historical analysis, and that this Court had concluded that the Fort Bridger Treaty of 1869 clearly contemplated the disappearance of the conditions specified in the Treaty, so that particular hunting right was temporary and precarious in nature, and intended to be of limited duration. *Id.* at 988-89 (citing *Race Horse*, 163 U.S. at 510).

Relying on *Race Horse*, the Tenth Circuit concluded that the hunting right conveyed in the Treaty with the Crows similarly terminated upon Wyoming's admission to the Union. *Repsis*, 73 F.3d at 992. The right terminated upon statehood because the right was intended by Congress to be temporary rather than perpetual, not because the right was repealed by implication under the equal footing doctrine. *Id.*

The Tenth Circuit provided two alternative grounds for its decision that the Crow Tribe could not hunt in the Bighorn National Forest without adhering to Wyoming's game laws. It determined that the creation of the Bighorn National Forest resulted in "occupation" of the land. *Repsis*, 73 F.3d at 993. Therefore, the Tribe could not exercise the right in that forest. *Id.* It also found that "states may regulate off-reservation treaty rights 'in the interest of conservation, provided the regulation meets appropriate standards, and does not discriminate against the Indians.'" *Id.* at 992 (quoting *Puyallup Tribe v. Dep't of Game of Wash.*, 391

U.S. 392, 398 (1968)) (*Puyallup I*). Such state conservation regulations must be reasonable and necessary for conservation. *Id.* (citing *Dep't of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44, 45 (1973) (*Puyallup II*) and *Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165, 175 (1977) (*Puyallup III*)). The Tenth Circuit found that even if the Crow Tribe's hunting right survived Wyoming's statehood, ample evidence in the record demonstrated that Wyoming's regulations governing elk hunting were reasonable and necessary for conservation. *Id.* at 992-93.

Following *Repsis*, this Court considered its earlier decision in *Race Horse*. In 1999, the Court determined that the Mille Lacs Band of Chippewa Indians' 1837 treaty right to hunt, fish, and gather wild rice was not abrogated by implication upon Minnesota's admission to the Union. *Mille Lacs*, 526 U.S. at 208. Unlike *Repsis*, which did not consider the equal footing doctrine to be a major premise of *Race Horse*, *Mille Lacs* described the doctrine as "the first part" of the holding in *Race Horse*. *Id.* at 203. The distinction is of little consequence, however, because both *Mille Lacs* and *Repsis* acknowledged that the equal footing doctrine had been rejected as a means to terminate Indian treaty rights at least as early as 1905. *Compare id.* at 226 n.7 (citing *United States v. Winans*, 198 U.S. 371, 382-84 (1905)) *with Repsis*, 73 F.3d at 991 (also citing *Winans*).

As the *Repsis* court had decided earlier, this Court expressly approved in *Mille Lacs* what it described as the alternative holding of *Race Horse*: Congress did not intend the language "the right to hunt on the

unoccupied lands of the United States" to survive Wyoming's statehood. *Mille Lacs*, 526 U.S. at 206. Thus, *Mille Lacs* reaffirmed that the proper inquiry is whether Congress intended treaty rights to be perpetual or to expire upon the happening of a clearly contemplated event, such as statehood. *Id.* at 206-07. Based on the treaty language and history of the right at issue in *Mille Lacs*, the Court concluded that Congress did not intend that those specific rights to hunt, fish, and gather wild rice would expire upon the happening of a clearly contemplated event, such as statehood, as Minnesota argued. *Id.* at 207-08.

In sum, *Mille Lacs*, *Repsis*, and *Race Horse* applied the same legal test, but came to different conclusions based on particular facts about each treaty.

II. Factual Background

In January 2014, nineteen years after this Court denied the Crow Tribe's petition for certiorari in *Repsis*, Herrera and other members of the Crow Tribe left the Crow Indian Reservation, crossed a fence, and entered the Bighorn National Forest in Wyoming. Pet. App. 5. The area was closed to elk hunting under Wyoming law. *Id.* Herrera shot a trophy bull elk, took the head with antlers, and left the headless carcass in Wyoming. April 27, 2016 Tr. Trans. at 3:30:55, 4:03:05,

5:30:43, 5:37:43.[1] At trial, Herrera testified that he removed some meat from the animal.[2]

After the January 2014 hunt, Herrera, who is a Game Warden for the Crow Tribe, approached the Wyoming Game and Fish Department to discuss mutual law enforcement issues along the shared border of the reservation and Wyoming. *Id.* at 3:20:19. He offered to "help in any way we can to catch violators near our mutual borders." *Id.* at 3:21:29. Wyoming Game Warden Dustin Shorma responded to Herrera's request. *Id.* The two Wardens met to discuss mutual poaching issues. *Id.* Herrera inquired about work performed by the Wyoming Game and Fish Department forensic laboratory. *Id.* at 3:26:11. During the meeting, Warden Shorma became suspicious of Herrera's intentions. *Id.* at 3:29:58.

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[1] "Tr. Trans." refers to the trial proceedings in the state circuit court. The trial proceedings are contained on audio files.

[2] Herrera claims "members of the Tribe . . . depend upon their treaty-protected hunting rights to feed their families to this day[;]" "[b]etween 1868 and 1995, members of the Crow Tribe continuously hunted in the Bighorn National Forest, almost entirely free of state interference[;]" and "[i]t is undisputed that the federal government allows year-round treaty hunting in the national forests." Pet. 3, 7, 9. These statements are not supported by any evidence admitted by the trial court, and they are inaccurate. As the State noted below, effective in 1908, Congress directed federal employees to "aid in the enforcement of the laws of the State or Territory in which said forest reservation is situated, in relation to the protection of fish and game[.]" 30 Stat. 1095. Wyoming has enforced its conservation laws in the Bighorn National Forest with federal cooperation since at least 1908. Wyoming produced its early game laws dating back to that time, and asked the court below to take judicial notice. Oct. 13. 2016 Br. of Appellee at 21-23.

Shorma believed Herrera was seeking information about ongoing Wyoming poaching investigations involving specific members of the Tribe. *Id.* at 3:26:30.

Warden Shorma returned from the meeting and performed a Google search on Herrera. *Id.* at 3:30:33. He found pictures of Herrera posing with a trophy elk in an area Warden Shorma believed to be in Wyoming, not on the Crow Indian Reservation. *Id.* at 3:30:55. The title of the online post was "Good Year on the Crow Reservation." *Id.* at 3:37:05. Suspecting the animal had been killed in Wyoming, Warden Shorma began his investigation of the incident at issue here. *Id.* at 3:58:19.

In the summer of 2014, Warden Shorma located the carcass from the elk Herrera shot, along with two other elk carcasses in the Bighorn National Forest in Wyoming. *Id.* at 4:03:05. DNA testing established one carcass matched an elk head seized from Herrera. *Id.* at 5:49:50.

III. Course of Proceedings

In September 2014, Warden Shorma cited Herrera with two misdemeanors: taking an antlered big game animal without a license or during a closed season; and accessory to taking an antlered big game animal without a license or during a closed season. Pet. App. 5. Wyoming brought misdemeanor charges against Herrera in the state circuit court. *Id.*

On July 2, 2015, Herrera filed a motion to dismiss the charges, arguing he was a Crow Tribal member and

enjoyed absolute immunity to hunt the "unoccupied lands of the United States" under Article 4 of the Treaty with the Crows, regardless of state regulation. Pet. App. 6. The State responded that, under the Tenth Circuit's decision in *Repsis*, *Race Horse*, and *Mille Lacs*, the Crow's treaty hunting right had expired. R. 767, 773-92. The State also asserted that the Bighorn National Forest was not "unoccupied land of the United States." R. 768, 793-802. Finally, the State contended that closed seasons are necessary for the conservation of the species, so Herrera was not immune from prosecution even if a Treaty right persists. R. 823-44, 970-79.

The State requested an evidentiary hearing to introduce indicia of occupation of the Bighorn National Forest, to establish that closed seasons are reasonable and necessary to conserve the species, and to aid in the interpretation of the Treaty. Pet. App. 6; R. 764-66, 805-06. The State also filed a motion in limine asking the court to prohibit Herrera from raising the Treaty at trial if the court denied Herrera's motion to dismiss. Pet. App. 6.

The circuit court scheduled evidentiary hearings, and the parties briefed the issues. Pet. App. 6-7. Herrera asserted that evidentiary hearings were unnecessary, and he requested that the court decline to receive evidence and to rule in his favor on all issues as a matter of law. *Id.* 7.

On October 16, 2015, the circuit court denied Herrera's motion to dismiss, and canceled its

scheduled evidentiary hearings. Pet. App. 36, 43. It concluded as a matter of law that Herrera did not have an off-reservation Treaty hunting right in the Bighorn National Forest. *Id.* 41-43. The circuit court found the off-reservation Treaty hunting right asserted by Herrera was "indistinguishable" from the Treaty issue adjudicated in *Repsis*. *Id.* 37. It noted that the Court in *Repsis* found the right to be extinguished because the Crow Tribe's Treaty hunting right was temporary and because the Bighorn National Forest is "occupied" within the meaning of the Treaty. *Id.* 38-39. While acknowledging that *Mille Lacs* rejected the equal footing doctrine as a basis to terminate off-reservation treaty hunting rights by implication at statehood, the circuit court found that Herrera mischaracterized *Mille Lacs* when he said it repudiated *Race Horse*. *Id.* 39.

The circuit court also recognized that even if the Treaty right persisted, Wyoming may regulate that right so long as the regulation is necessary for conservation. Pet. App. 39-40. On this point, the circuit court held that Wyoming's elk hunting seasons were nondiscriminatory, reasonable, and necessary for conservation and, therefore, enforceable against Herrera even if his treaty right still existed. *Id.* 41-42. It then granted the State's motion in limine to prohibit Herrera from discussing the Treaty at trial. *Id.* 43.

Herrera immediately filed petitions with the Wyoming Supreme Court for a writ of review, a writ of certiorari, and a writ of prohibition, all of which were denied. Herrera next filed a notice of appeal to the district court, which dismissed the interlocutory appeal

for lack of jurisdiction. Herrera then asked the circuit court to reconsider the State's motion in limine, but that motion was denied as well. Finally, Herrera unsuccessfully sought emergency orders to stay trial from the circuit court, the Wyoming Supreme Court, and this Court. Pet. App. 8.

Herrera went to trial on April 27 through 29, 2016. Under oath, he admitted his role in killing three elk. Pet. App. 9. However, he repeatedly denied he was in Wyoming when he acted, but rather testified he was on the Crow Reservation. Herrera said that if he had been in Wyoming when he acted, it would be a "violation." April 28, 2016 Tr. Trans. at 2:53:25-2:53:35; 3:20:25-3:25:05; R. 1427. At one point in the trial, he marked the spot where he shot the elk on a State exhibit. R. 1451. That spot is within Wyoming, but Herrera claimed it was Crow land. April 28, 2016 Tr. Trans. at 3:06:37-3:07:23; R. 1429-51. The jury convicted Herrera on both counts. Pet. App. 9. The state circuit court sentenced him to an $8,080 fine, a one-year suspended jail sentence, and suspended his access to Wyoming hunting privileges for three years. *Id.*; R. 1468-69. His direct appeal to the state district court followed. R. 1481-94.

At oral argument, the district court expressed concern that Herrera was attempting to relitigate the issue decided in *Repsis*. Pet. App. 10. It questioned whether collateral estoppel barred Herrera's assertion of the treaty defense, and ordered supplemental briefing on the issue. *Id.* Following the submission of supplemental briefs, the district court affirmed the circuit

court on multiple grounds, relying primarily on the doctrine of collateral estoppel. *Id.* 31.

In an unpublished opinion, the state district court conducted an exhaustive analysis of the doctrine and its applicability to this case. Pet. App. 10-31. It determined that the issue raised by Herrera was identical to the issue fully litigated by the Crow Tribe in *Repsis*. *Id.* 13-14. The court determined that all elements of collateral estoppel were met. *Id.* 13-18. Herrera does not challenge this determination by the district court in his petition to this Court.

The state district court also considered and dismissed all notable exceptions to collateral estoppel, including whether *Mille Lacs* changed the applicable legal context. Pet. App. 19-26. The district court concluded that *Mille Lacs* did not overturn *Race Horse* or *Repsis*. *Id.* 24. The district court determined *Mille Lacs* did not change the fundamental legal principle at issue, because *Mille Lacs* did not reject the temporary and precarious doctrine. Rather, *Mille Lacs* clarified that the focus of the *Race Horse* inquiry is whether Congress intended the rights to survive statehood. *Id.* 23 (citing *Mille Lacs*, 526 U.S. at 207). Accordingly, because *Repsis* and *Mille Lacs* are consistent, the district court concluded that *Mille Lacs* did not change the applicable legal context. *Id.* 24. Because no exception applied, Herrera was properly estopped from relitigating the validity of the hunting right. *Id.* 31.

The state district court also set forth as an independent alternative basis for affirmance that the state

circuit court properly adopted the reasoning of *Repsis*. Thus, regardless of whether collateral estoppel precluded the defense, the circuit court affirmatively and correctly determined that the right had expired and provided no defense to the criminal prosecution. Pet. App. 31-33. Moreover, the district court found that the circuit court had properly concluded, consistent with the Tenth Circuit's analysis in *Repsis*, that the Bighorn National Forest is occupied as a matter of law within the meaning of the Treaty. *Id.* 21-22.

After his conviction, Herrera petitioned the Wyoming Supreme Court for a writ of certiorari, which the court denied. Pet. App. 1-2. He now brings the instant petition requesting a writ of certiorari to the state district court.

REASONS TO DENY THE PETITION

I. Petitioner seeks to avoid the application of collateral estoppel by framing the Question Presented as one of treaty interpretation, but collateral estoppel is a threshold issue that must be decided before the Court can interpret the Treaty.

Collateral estoppel or issue preclusion "bars successive litigation of 'an issue of fact or law' that 'is actually litigated and determined by a valid and final judgment, and . . . is essential to the judgment." *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (citing Restatement (Second) of Judgments § 27 (1980)). Even when the

core requirements of the doctrine are met, the Court may decline to apply the doctrine if there has been a change in the applicable legal context. *Id.* (citing Restatement (Second) of Judgments § 28, cmt. c (1980)).

Whether the off-reservation Treaty hunting right persists is the same issue the Crow Tribe raised in *Repsis*. Pet. App. 13. In fact, in his Petition, Herrera does not contest the state district court's determination that all elements of collateral estoppel were present. Instead, Herrera's sole argument is that *Mille Lacs* "undoubtedly" "changed the legal context," thereby allowing him to relitigate the Treaty issue and collaterally attack the judgment of the Tenth Circuit in *Repsis*. *See* Pet. 15. That argument does not square with the actual holding of *Mille Lacs*, because in that case, this Court specifically approved the alternative holding of *Race Horse*. *Mille Lacs*, 526 U.S. at 206-07. Building on this faulty premise, Herrera asserts the issue for review is "clean" and that the Court's decision "will answer whether there was a change in the applicable legal context." Pet. 15.

This approach has significant problems. It ignores the threshold issue underpinning the state district court's principal holding and invites this Court to interpret the Treaty without the benefit of a fully developed record. This approach contravenes the very reasons why the Court adheres to the doctrine – to give finality to judgments, to prevent the legal harassment of litigants, to prevent the abuse of judicial resources, and to minimize potential of inconsistent decisions. *See, e.g.*, *Baldwin v. Iowa State Traveling Men's Assoc.*,

283 U.S. 522, 525 (1931) ("Public policy dictates that there be an end of litigation that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled[.]"); *see also Montana v. United States*, 440 U.S. 147, 153-54 (1979) (application of res judicata and collateral estoppel is necessary to conclusively resolve disputes, to protect litigants from vexatious litigation, to conserve judicial resources, and to foster reliance on judicial action by minimizing the possibility of inconsistent decisions). Like res judicata, collateral estoppel "is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts[.]" *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. R.R. Supply Co.*, 244 U.S. 294, 299 (1917)). This Court should decline Herrera's invitation to disregard the doctrine.

In his petition, Herrera offers no good reason why this Court should ignore the policies that have led it to apply the doctrine of collateral estoppel. Courts should, and do, routinely consider the preclusive doctrines before deciding issues on the merits. *See, e.g.*, *Cooper v. Harris*, 581 U.S. ___ (2017) ("We address at the outset North Carolina's contention that a victory it won in a very similar state-court lawsuit should dictate (or at least influence) our disposition of this case."). That is exactly what the state district court did in this case, when it honored the preclusive effect of the Tenth Circuit's decision in *Repsis*. Pet. App. 11-26.

Herrera also contends the alternative holding in *Repsis* – that the establishment of the Bighorn National Forest occupied the forest – does not collaterally estop further litigation of that issue because it was not essential to the judgment.[3] Pet. 32 n.12. This is incorrect. The general rule provides: "an alternative ground upon which a decision is based should be regarded as 'necessary' for purposes of determining whether [a party] is precluded by the principles of res judicata or collateral estoppel from relitigating in a subsequent lawsuit any of those alternative grounds." *Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1402 (7th Cir. 1987).[4] As the state district court noted,

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[3] Herrera also argues agreements from 1891 and 1904, and the Forest Reserve Act contain savings clauses that state Indian treaty rights are not changed, repealed, or modified as a result of those agreements and Act. Pet. at 23. He bases this argument upon a fallacy. Wyoming became a state in 1890. If the hunting right terminated at Wyoming's statehood, as *Mille Lacs* confirmed, then agreements and Acts passed subsequent to statehood with savings clauses stating they did not change, repeal, or modify treaties do nothing to aid in determining what those rights were at the time. Regardless, as the state district court noted, the *Repsis* court knew of these agreements and Acts. Pet. App. 13. Herrera also claims the creation of the forest is akin to *Mille Lacs* where this Court determined executive action cannot cancel treaty rights not abrogated by Congress. But Congress cured any executive action problem when it suspended the 1897 proclamations and re-enacted them. 30 Stat. 34.

[4] As *National Satellite Sports v. Eliadis, Inc.*, 253 F.3d 900 (6th Cir. 2001) noted, there is a split of authority on the issue as to whether a litigant must be estopped from relitigating alternative grounds in a subsequent lawsuit. But as this Court has stated, "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is *obiter*, but each is the judgment of the court and of

Repsis had two alternative holdings: the forest is occupied within the meaning of the treaty, and the record contains ample evidence to support a finding that the regulations were reasonable and necessary for conservation even if the hunting right persists. Pet. App. 21-22. Herrera should be estopped from relitigating these issues as well as the Treaty issue he presents.

And even if the Tenth Circuit wrongly decided *Repsis* in 1995, its conclusions should not be upset. As the state district court noted, estoppel applies when a fact, question, or right has been adjudicated in a previous action, "even though the determination was reached upon an erroneous view or by an erroneous application of the law." Pet. App. 25-26 (citing *United States v. Moser*, 266 U.S. 236, 242 (1924)). The Tenth Circuit adjudicated the exact Treaty hunting right at issue here, and the Crow Tribe itself was a party. Thus, even if Herrera were correct that in light of *Mille Lacs*, *Repsis* was wrongly decided, this specific right has been adjudicated and is final under the general rule announced by the Court in *Moser*. The Crow Tribe and its members cannot litigate the same legal issue in perpetuity.

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equal validity with the other." *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 485-86 (1924) (internal citations omitted). In any event, Herrera has not presented this question to this Court for review, and the issue is distinct from whether, if Herrera could prevail on the treaty interpretation issue, one or both of the alternative holdings of *Repsis* would become a primary holding.

II. Collateral estoppel is appropriate because this Court's decision in *Mille Lacs* did not overrule the earlier decision by this Court specifically interpreting Indian treaty rights in Wyoming.

In an attempt to avoid collateral estoppel, Herrera claims an exception to estoppel applies because *Mille Lacs* "undoubtedly changed the applicable legal context." Pet. 15. To the contrary, the law remains the same after *Mille Lacs*, so he cannot evade the doctrine.

For a change in law to overcome the effect of collateral estoppel, three elements must be met: (1) the basic law must have been altered; (2) the decision sought to be reopened must have applied old law; and (3) the change in law must compel a different result under the facts of the case. *Dow Chem. Co. v. Nova Chem. Corp. (Canada)*, 803 F.3d 620, 628-30 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 2452 (2016) (citing 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4425 (2d ed. 2002)). It is not enough that a party wishes to reargue the law – there must be an independent change. *Id.* at 629; *see also Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1278 (Fed. Cir. 2009) (intervening law exception applied where prior opinion had "clearly applied the [old] test"); *Litton Sys., Inc. v. Honeywell, Inc.*, 238 F.3d 1376, 1380 (Fed. Cir. 2001) (holding that intervening law exception to law of the case applied where previous opinion had followed approach

expressly repudiated by intervening en banc decision).

The applicable legal context has not changed. Herrera's assertion that *Mille Lacs* "thoroughly repudiated" *Race Horse* is false. *See* Pet. at 18. *Mille Lacs* expressly validated the alternative holding of *Race Horse*: that Congress did not intend the language "the right to hunt on the unoccupied lands of the United States" to survive Wyoming's statehood. *Mille Lacs*, 526 U.S. at 206. And although *Mille Lacs* rejected the application of the equal footing doctrine to terminate treaty rights by *implication* at statehood, it noted that this Court previously had rejected the equal footing doctrine to terminate Indian treaty rights dating back to 1905. *Id.* at 226 n.7 (citing *Winans*, 198 U.S. 371). So, when the *Mille Lacs* Court determined that the equal footing doctrine could not terminate treaty rights by implication upon statehood, nothing changed in the law.

As the state district court correctly noted, *Mille Lacs* did not change the fundamental legal principles applicable to the interpretation of treaties, because *Mille Lacs* reaffirmed that when a court interprets a treaty, the proper inquiry is whether the rights were intended to be perpetual, or whether they were intended to expire upon the happening of an event. Pet. App. 21-24. *Mille Lacs* clarified that the focus of the *Race Horse* inquiry is whether Congress intended the rights to survive statehood. Pet. App. 23. That approach is consistent with the alternative holding in *Race Horse* and consistent with *Repsis*. In fact, the

Repsis court examined the equal footing doctrine and acknowledged that the United States could create a right in a territory later enforceable against a state. *Repsis*, 73 F.3d at 991 (citing *Winans*, 198 U.S. at 381-82). *Repsis* noted the proper inquiry is whether the treaty right was intended at its formation to be continuing or perpetual. *Id.*

In *Mille Lacs*, this Court held that usufructuary treaty rights may not be terminated by implication at statehood under the doctrine of equal footing, but the Court did not announce a new test for treaty interpretation. 526 U.S. at 207-08. And termination by implication at statehood is not what happened in the alternative holding of *Race Horse*, in *Repsis*, or in this case. Rather, the hunting right was interpreted to be temporary and subject to expiration upon the happening of a clearly contemplated event.

Herrera's petition includes numerous statements that Wyoming has asserted that the Treaty with the Crows was "abrogated" by statehood, or that courts such as *Repsis* determined Wyoming's admission to the Union "abrogated" the Treaty. *See, e.g.*, Pet. 10, 14. These statements are inaccurate. None of the courts to address the issue – the courts below or the Tenth Circuit in *Repsis* – determined the Treaty has been abrogated. When a treaty right is temporary and expires according to its own terms, this is the effect of the treaty itself. Wyoming has had no reason to argue abrogation and has not.

Herrera claims that the only clearly contemplated event here is occupation. Pet. 22. Certainly, occupation would terminate the right in the forest, but it is not the only event that could lead to this result. The *Race Horse* Court determined the terminating event was statehood, and *Mille Lacs* affirmed that conclusion. *Race Horse*, 163 U.S. at 515; *Mille Lacs*, 526 U.S. at 206. The basic law of treaty interpretation has not changed and the first element of the collateral estoppel exception is not met.

III. Because the state circuit court determined the Treaty issue as a matter of law, it denied Wyoming the opportunity to create the record this Court demands before interpreting an Indian treaty.

Herrera asks this Court to ignore the dispositive issue of estoppel and decide whether the 1868 Treaty has been abrogated. Pet. 15. Herrera contends this answer will also determine whether a change in the applicable legal context prevents application of collateral estoppel. *Id.* That approach is inherently flawed. Even if this Court accepted Herrera's invitation to interpret the Treaty, the Court lacks the proper record to resolve the issues of treaty interpretation, occupation, or the State's power to regulate for conservation necessity.

When interpreting treaties, this Court "look[s] beyond the written words to the larger context that frames the Treaty, including the history of the treaty,

the negotiations, and the practical construction adopted by the parties." *Mille Lacs*, 526 U.S. at 196 (citations omitted).

With his brief in support of his motion to dismiss before the circuit court, Herrera submitted affidavits. Pet. App. 6-7. As the state district court noted, those affidavits contained inadmissible hearsay, and the State objected to the hearsay they contained. *Id.* 7. Herrera argued that evidentiary hearings were not necessary to determine his motion to dismiss, and he invited the trial court to determine all issues as matters of law. *Id.* The State requested an evidentiary hearing to introduce indicia of occupation in the Bighorn National Forest, to establish that closed seasons were reasonable and necessary to conserve the species, and to aid in the interpretation of Article 4. Pet. App. 6.

The state circuit court did not rule on the admissibility of Herrera's exhibits. As the district court stated, "it is unclear which of the exhibits the circuit court relied on when making its decision, or which of these exhibits, if any, were actually admitted into evidence by the court." Pet. App. 6. The circuit court did not admit any of Herrera's inadmissible hearsay documents into evidence. In any event, the State could not offer its own evidence because the circuit court canceled the evidentiary hearings.[5] Because the circuit

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[5] The district court incorrectly stated that both parties submitted exhibits containing inadmissible hearsay. Pet. App. 7. While Herrera submitted inadmissible hearsay documents, the State merely requested that the court take judicial notice of

court decided these issues as a matter of law, no evidence about the Treaty's history, negotiations, or construction by the parties is before this Court. Thus, even if Herrera could cross the hurdle of collateral estoppel and the *Moser* rule that adjudicated rights are final even if the determination was reached upon an erroneous application of law, this case lacks an adequate record to interpret the Treaty.[6] Remand would be required to develop evidence in the trial court, but, of course, Herrera does not seek such relief in his petition. Because the question presented by Herrera cannot be reviewed by this Court without a developed record, the petition should be denied.

Similarly, the issues of occupation and conservation necessity are not developed in the record. Even if this Court accepts Herrera's invitation to interpret the Treaty before addressing collateral estoppel and determines the right resurrected, this Court would then need to examine whether the Bighorn National Forest is occupied within the meaning of the treaty, and whether Wyoming's closed seasons are necessary to conserve the species. Before any such determination, the State would be entitled to a remand to develop

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certain laws, and attached copies of those laws. The State did not have the opportunity to submit testimonial and other evidence that it intended to offer at the evidentiary hearings.

[6] Herrera cites evidence he claims supports his interpretation of the Treaty. *See, e.g.*, Pet. 22 (referencing R. 250, and claiming the record supports his interpretation of the hunting right). But all of Herrera's record cites are to inadmissible hearsay documents that were not admitted into evidence.

a record regarding indicia of occupation and conservation necessity. *See, e.g.*, *Puyallup Tribe*, 391 U.S. at 398, 401-03 (recognizing tribal fishing "may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians" and remanding the litigation back to state court to determine whether a total ban on Indian net fishing was justified by the interest of conservation). Accordingly, this case is not a clean vehicle to interpret the Treaty and revive a long-expired treaty hunting right.

IV. This Court interprets every treaty with an Indian tribe with attention to both its specific text and its specific historical context, and the court decisions cited by Petitioner reflect different treaties and not a split in authority.

Herrera does not claim that the collateral estoppel ruling that decided this case warrants review or reflects a circuit split. Instead, he asserts that courts "in the Ninth Circuit would reject the proposition that the 1868 Treaty was abrogated because the relevant land was rendered 'occupied' by either the Forest Reserve Act or the creation of the Bighorn National Forest." Pet. 27. But the potential that another circuit *could* reach a different decision does not identify a true split among the circuits. *See* Sup. Ct. R. 10 (contemplating actual as opposed to theoretical conflicts). No other circuit has interpreted the treaty language at issue here.

The only courts to address this precise treaty language are this Court in *Race Horse* and the Tenth Circuit in *Repsis*. Herrera's assertion that a different court in a different circuit might interpret language in a different treaty in a different manner does not identify a circuit split.

Herrera also cites "numerous state courts of last resort" as evidence of a split in authority. Pet. 25-27 (citations omitted). But those courts were interpreting different treaties. Other courts have certainly interpreted other treaties with distinct language differently. In fact, many of the treaties Herrera cites involve treaties negotiated by Governor Stevens, with different language, negotiated with different tribes, at different times in U.S. history. *See id.* at 26-27 (citing various treaties containing language such as "open and unclaimed," rather than the specific language at issue here). The Treaty with the Crows is not a Stevens treaty. Herrera's claim that different state courts have interpreted different treaty language does not create a split in authority warranting this Court's review.

V. The Treaty with the Crows has specific language that is not widely replicated, so the decision below has limited precedential value and does not affect other Indian tribes.

Herrera claims "the issue here affects every other Indian tribe that reserved similar treaty rights." Pet.

29. As discussed above, none of the treaties cited by Herrera – other than the Fort Bridger Treaty in *Race Horse* that this Court has already interpreted – have the same language. As discussed, this Court cannot interpret the hunting provision without a developed factual record. This petition for certiorari asks the Court to review an unpublished decision from a state district court operating as an intermediate court of appeal. Treaties with different language, in other states, are highly unlikely to be affected.

CONCLUSION

The real issue before this Court is collateral estoppel, not treaty interpretation. The state district court properly applied that doctrine and also properly rejected the exception to the doctrine because *Mille Lacs* did not change the applicable legal context. This Court applied the same legal test in *Mille Lacs* as it had in *Race Horse* and as had the Tenth Circuit in *Repsis*. Herrera should not be permitted to collaterally attack the Tenth Circuit's decision in *Repsis*, which has bound the Crow Tribe and its members on the issue for nearly a quarter century, and whose legal basis has not been

undercut during that time. Accordingly, this Court should deny the petition.

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No. 17-532

In the Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Petition for Writ of Certiorari to the District Court of Wyoming, Sheridan County

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REPLY BRIEF

This Court has unequivocally established that Indian "[t]reaty rights are not impliedly terminated upon statehood," and that Congress is required to "clearly express" its intent to abrogate such rights. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202, 207 (1999). Flouting those straightforward principles, the court below concluded that 149-year-old federal treaty rights allowing the Crow Tribe of Indians to hunt on the "unoccupied lands of the United States" are categorically extinct, and Crow Tribe members can be criminally convicted for engaging in expressly protected conduct. That decision and the decision on which it relied, *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), are profoundly wrong, in conflict with numerous other decisions, and have resulted in Petitioner's unjust conviction. Certiorari is warranted.

On the merits, the state hardly defends the decision below or *Repsis*, and understandably so. The 1868 Treaty between the Tribe and the United States identifies the events that lead to termination of the hunting rights, and Wyoming's statehood is not one of them. That makes statehood an implicit event of abrogation, which is the very theory repudiated by *Mille Lacs*. Nor does the novel notion that the Bighorn National Forest "occupied" the Tribe's hunting grounds and extinguished its treaty rights fare any better, because the statute authorizing that forest expressly disclaimed any intent to abrogate Indian treaties.

The state's response to the split of legal authority implicated by the decision below and *Repsis* is to ignore two conflicting decisions and to deem the others distinguishable based on differing treaty language. But the language of one of those treaties is *identical* to the 1868 Treaty's language, and the language of the other treaties is materially identical. Disregarding relevant decisions and identifying distinctions without a difference does not render the split illusory.

The state primarily urges denial of review because, under collateral estoppel principles, *Repsis* forever prevents the Tribe from vindicating its federal rights. But *Repsis* concluded that Wyoming's statehood impliedly abrogated the Tribe's treaty rights, and *Mille Lacs* subsequently held that statehood does no such thing. Because the "applicable legal context" undergirding *Repsis* has undoubtedly changed, collateral estoppel is inapplicable. *Bobby v. Bies*, 556 U.S. 825, 834 (2009). And this Court does not need any more developed record to resolve the purely legal question presented here, which has thoroughly percolated in these and other proceedings. In short, nothing prevents this Court from deciding the exceptionally important question whether federal treaty rights foundational to the Crow Tribe's well-being and identity have been extinguished in perpetuity and, consequently, Tribe members can be criminally convicted for engaging in protected activity.

I. The Decision Below Is Incorrect.

The state doubles down on the judgment below, emphatically asserting that the Tribe's federal-treaty hunting rights are categorically extinct and have been since *Repsis*. Opp.2. But it offers no real defense of

the only two possible justifications for that conclusion: Wyoming's admission to the Union in 1890 and the establishment of the Bighorn National Forest in 1897. *See Repsis*, 73 F.3d at 992-93, 994. That is unsurprising, for both rationales are indefensible.

As for Wyoming's admission to the Union, *Mille Lacs* made clear that Indian "[t]reaty rights are not impliedly terminated upon statehood." 526 U.S. at 207. But the only way Wyoming's statehood could have terminated the Tribe's hunting rights is *by implication*, as the state's arguments confirm. The state cites no language in Wyoming's statehood act that abrogated the hunting rights. Nor does the state identify anything in the 1868 Treaty providing that Wyoming's statehood would abrogate those rights. The 1868 Treaty specifically identified the conditions that would terminate the Tribe's hunting rights: (1) the hunting grounds become occupied; (2) the grounds cease to be owned by the United States; (3) game is no longer found on the grounds; or (4) peace no longer subsists between the Tribe and settlers. Pet.20-21. Wyoming's statehood is conspicuously absent. Understandably so: when the 1868 Treaty was signed, Wyoming was not even a *territory*. *See* An Act to Provide a Temporary Government for the Territory of Wyoming, July 25, 1868, 15 Stat. 178.

The state counters that, under *Mille Lacs*, "the proper inquiry is whether Congress intended treaty rights to be perpetual or to expire upon the happening of a clearly contemplated event, such as statehood." Opp.7; *see id.* at 20-22. But this gets the state nowhere, because *Mille Lacs* did not consider "statehood" to be a "clearly contemplated event" in

either the treaty before it or the treaty at issue in *Ward v. Race Horse*, 163 U.S. 504 (1896)—which, the state concedes, used the same relevant language as the 1868 Treaty. Opp.1, 5, 27. Instead, *Mille Lacs* expressly stated that in the *Race Horse* treaty (and, *a fortiori*, the identical 1868 Treaty), the "rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States." 526 U.S. at 207. Again, there is no mention of statehood, which is precisely why *Mille Lacs* made clear that "[t]reaty rights are not impliedly terminated upon statehood." *Id.* That emphatic pronouncement would have been completely unnecessary if the relevant treaties before the Court "clearly contemplated" statehood as a rights-terminating event. Put simply, *Mille Lacs* forecloses any suggestion that Wyoming's admission terminated the Tribe's treaty hunting rights.

If the state's argument regarding Wyoming's admission is unpersuasive, its argument regarding the creation of the Bighorn National Forest is nonexistent. The state does not defend the proposition that the Tribe's rights to hunt expired when President Cleveland established the forest, save that the court below "properly concluded, consistent with the Tenth Circuit's analysis in *Repsis*, that the Bighorn National Forest is occupied as a matter of law within the meaning of the Treaty." Opp.14. That *ipse dixit* is no answer to the relevant text of the Forest Reserve Act and President Cleveland's proclamation, well-established precedent, and common sense, all of which thoroughly refute the state's assertion. Pet.21-24.

II. Federal And State Courts Are Divided.

The state insists that there is "no split of authority in need of reconciliation." Opp.2, 25-26. The state does not dispute, however, that the court below squarely held that "*Mille Lacs* did not overturn *Race Horse*," Pet.App.24, yet other courts have just as squarely held that this Court "overruled *Race Horse* in ... *Mille Lacs*," *State v. Buchanan*, 978 P.2d 1070, 1083 (Wash. 1999). One can hardly conceive of a starker conflict—and over the two precedents most relevant to this case. Furthermore, the Ninth Circuit has explicitly "reject[ed]" the proposition that the Forest Reserve Act "gave [the president] the power to extinguish Indian treaty rights in those [federal] lands." *Swim v. Bergland*, 696 F.2d 712, 717 (9th Cir. 1983). Again, that is the exact opposite conclusion reached in the decision below and *Repsis*, both of which agreed that President Cleveland could lawfully extinguish the Tribe's hunting rights through the Forest Reserve Act. *See* Pet.App.33-34. Remarkably, the state does not even address *Buchanan* or *Swim*. It is easy to claim that "no split of authority" exists when one ignores the conflicting decisions.

The state next asserts that *Repsis* and the decision below do not conflict with any decisions addressing other treaties that reserved off-reservation rights like those reserved in the 1868 Treaty, ostensibly because those treaties contain "distinct language." Opp.26. But there is nothing "distinct" about the treaty language at issue in *State v. Tinno*, where the Idaho Supreme Court considered an 1868 treaty between the United States and the Eastern Band Shoshone and Bannock Tribes that preserved

fishing rights for those tribes on the "unoccupied lands of the United States." 497 P.2d 1386, 1389-90 (Idaho 1972). That language is *identical* to the language at issue here (and in the *Race Horse* treaty, for that matter). *Tinno* is thus directly on point and contrary to the decision below and *Repsis*: Addressing whether national forestland is included within the "unoccupied lands of the United States," the *Tinno* court concluded that under "[a] plain reading of the treaty provision," there was "no serious geographical question presented." *Id.* at 1391.

Nor can the state distinguish the Crow treaty from the "Stevens treaties" addressed by several state supreme courts, which reserved for various tribes the right to hunt on "open and unclaimed" lands. Opp.26. There is no material difference (and the state identifies none) between language in the Stevens treaties referring to "open and unclaimed" lands and language in the Crow treaty referring to "unoccupied" lands. The Washington Supreme Court held as much in *Buchanan*, when it defined "open and unclaimed" lands in the Stevens treaties as "publicly-owned lands, which are not obviously occupied." 978 P.2d at 1082. And the Montana Supreme Court, relying on Idaho Supreme Court precedent, similarly defined "open and unclaimed" lands in the Stevens treaties as including lands "'not settled and occupied.'" *State v. Stasso*, 563 P.2d 562, 565 (Mont. 1977) (quoting *State v. Arthur*, 261 P.2d 135, 141 (Idaho 1953)); *see also id.* ("open and unclaimed" lands encompass "National Forest lands"); *Arthur*, 261 P.2d at 141 ("National Forest Reserve ... was 'open and unclaimed land.'").

Finally, the state does not contest that the split encompasses states containing the vast majority of the Nation's forestland and home to Native American tribes whose treaties are substantially similar (if not identical) to the 1868 Treaty. *See* Pet.27 n.9. This Court's resolution of the unsettled law is thus all the more critical.

III. There Are No Obstacles To Reviewing This Important Issue.

The state does not dispute that the issue here is important to the Crow Tribe. Nor could it. As *amici* attest, "[b]y curtailing the longstanding right to hunt outside the limits of the reservation, the decision below poses a dire threat" to all members of the Tribe, Anthropologists Br.10, who will now be "subject to criminal penalties for engaging in treaty-guaranteed off-reservation hunting," even subsistence hunting, Crow Tribe Br.12. And, of course, this case will literally affect whether Petitioner, who was criminally convicted for engaging in conduct that a federal treaty expressly protects, can provide for his family. Pet.29.[1]

More broadly, this case affects numerous other tribes, as no fewer than 19 federal treaties protect the

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[1] The state disputes that Tribe members depend upon their treaty-preserved hunting rights to feed their families. Opp.8 n.2. But none of the state's citations actually refutes that proposition. Furthermore, despite attempting to malign Petitioner's motives, the state does not contest that Petitioner was hunting for subsistence purposes during the hunt that gave rise to his conviction. *See* Pet.App.5 (court acknowledging that Petitioner "took the meat back with [him] to Montana"); R.1466 (state exhibit informing jury that the "tribal hunters ... later distributed the elk meat among their families").

"right to hunt on Federal lands away from the[] respective reservations." Crow Tribe Br.9; *see also* Law Professors Br.14 ("Reserved [h]unting and fishing rights are significant in a public health context because many tribal communities rely upon these traditional foods for subsistence."); Pet.28-29. The state downplays the broader implications by claiming that some treaties use language that is only synonymous, rather than identical, to the Crow treaty language, Opp.26, but as already explained, those are distinctions without a difference.

Instead, the state places most of its chips on the collateral estoppel doctrine introduced *sua sponte* by the court below, arguing that *Repsis* precludes Petitioner and *all* Crow members from *forever* exercising their treaty hunting rights. Opp.14-22. Indeed, the state takes the remarkable position that "even if [Petitioner] were correct that in light of *Mille Lacs*, *Repsis* was wrongly decided, this specific right has been adjudicated and is final." Opp.18. That is not how collateral estoppel works.

Under federal collateral-estoppel law—which indisputably governs here—collateral estoppel does not apply when "a change in the applicable legal context" occurs after the earlier judgment. *Bobby*, 556 U.S. at 834; Pet.30. That principle is dispositive here, as there have indisputably been profound shifts in the law undergirding *Repsis*. In 1896, *Race Horse* concluded that Wyoming's statehood impliedly terminated the Bannock Tribe's treaty rights. 163 U.S. at 514. *Repsis* followed suit in 1995 by relying on *Race Horse* to declare that identical rights-preserving language in the Crow Tribe's treaty was impliedly

"repealed by the act admitting Wyoming into the Union." 73 F.3d at 992, 994. But *Mille Lacs* then established in 1999 that Indian "[t]reaty rights are not impliedly terminated upon statehood." 526 U.S. at 207. It is difficult to imagine a more substantial legal change than that.[2]

Echoing the court below, the state nevertheless insists that *Mille Lacs* "did not overrule" *Race Horse*, and thus *Repsis* maintains collateral-estoppel effect. Opp.19; Pet.App.24 n.6. As a threshold matter, the standard for deeming collateral estoppel inapplicable is not whether a decision has been "overruled," but rather whether there has been a "change in the applicable legal context," as the state elsewhere admits. Opp.15. *Mille Lacs* undoubtedly did at least that much: *Repsis* squarely held that Wyoming's statehood impliedly repealed the Tribe's hunting rights, and *Mille Lacs* just as squarely held that statehood does not impliedly repeal Indian treaty rights.

Regardless, all nine members of the *Mille Lacs* Court would disagree that *Mille Lacs* did not overrule

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[2] Relying on dated decisions, the state suggests that *Repsis*'s observation that President Cleveland's presidential proclamation "occupied" the Bighorn National Forest should be accorded preclusive effect. Opp.17-18. This Court's recent precedent, however, unequivocally holds that collateral estoppel applies only to a determination "essential to the judgment," and a determination is "essential" only when "the final outcome hinges on it." *Bobby*, 556 U.S. at 835 (citing Restatement (Second) of Judgments §27 cmt. h (1982)). The state does not dispute that *Repsis*'s "final outcome" did not "hinge[]" on its alternative determination regarding the proclamation, rendering collateral estoppel inapplicable.

Race Horse. The dissent repeatedly accused the majority of "overrul[ing]" *Race Horse*—in whole, not in part—without objection by the majority. 526 U.S. at 219 & n.3, 220 (Rehnquist, C.J., dissenting). And commentators have likewise declared *Race Horse* a dead letter following *Mille Lacs*. *See, e.g.*, Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 Idaho L. Rev. 475, 551 n.473 (2005) (noting that "*Race Horse* and its progeny have been effectively abrogated" by *Mille Lacs*).

Even the state concedes that *Mille Lacs* jettisoned the "equal footing" doctrine invoked by *Race Horse*. Opp.20-21. And it essentially admits that *Mille Lacs* rejected *Race Horse*'s "temporary and precarious" doctrine, which the state does not once mention (much less defend) except when describing other courts' holdings. Opp.4-5, 10; Pet.31-32.[3] It is thus unclear what, exactly, the state thinks remains of *Race Horse* after *Mille Lacs*. The state claims at several points that *Mille Lacs* "expressly approved" the "alternative holding of *Race Horse*." Opp.6-7, 15, 20. But that argument grossly misreads *Mille Lacs*, which, in addressing that "alternative holding," repudiated "the line suggested by *Race Horse*"—*i.e.*, the "temporary and precarious" doctrine invoked by *Repsis* and the decision below—and held instead that the appropriate inquiry is whether the treaty contains a "clearly

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[3] The state's virtual abandonment of the "temporary and precarious" doctrine is especially telling since that doctrine was the *sole* aspect of *Race Horse* that the court below believed to survive *Mille Lacs*. *See* Pet.App.24 n.6.

contemplated" event that would terminate a reserved right. *See* pp. 3-4, *supra*.

At a minimum, the federal collateral-estoppel issue here presents no barrier to review because it is inextricably intertwined with the question presented. Pet.32. Whether the Crow Tribe retains its treaty-preserved hunting rights depends on the scope of *Mille Lacs*, including the extent to which it overruled *Race Horse* and abrogated *Repsis*—which is the same analysis underlying the collateral-estoppel inquiry. Nothing prevents this Court from addressing (and rejecting) the state's argument on plenary review, as the state's citations demonstrate. *See Cooper v. Harris*, 137 S. Ct. 1455, 1467-68 (2017) (addressing and rejecting collateral-estoppel argument). And it would be especially misguided to deny review based on collateral estoppel when the decision below alternatively *addressed the merits*. Pet.App.31-34; Opp.14.

Finally, the state contends that the question presented "cannot be reviewed ... without a developed record." Opp.24; *see id.* at 22-24. But as the court below acknowledged, whether the Tribe's federal treaty hunting rights have terminated is a pure "question[] of law." Pet.App.9. That question—and the relevant legal and historical authorities bearing upon it—has been exhaustively addressed in this case and other cases examining materially similar treaties.[4] In any event, the record in this case (to say nothing of the *amicus* briefs) contains hundreds of

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[4] Accordingly, as both courts below recognized in deciding this *legal* issue, it is utterly irrelevant that the trial court "did not rule on the admissibility of" some of Petitioner's exhibits. Opp.23.

pages of evidence about the history of the 1868 Treaty, its negotiations, and the practical construction adopted by the parties. As it did in *Mille Lacs*, this Court can safely draw upon those documents to determine the answer to the important legal issue before it.[5]

At bottom, there are no obstacles to deciding whether the rights of all Crow Tribe members should eternally be held hostage to legal reasoning that flunks every test of treaty interpretation, statutory interpretation, and common sense. But if these century-old federal treaty rights really are no longer the "supreme Law of the land," and Tribe members can be criminally convicted for engaging in expressly protected activities, the Tribe deserves to receive that extraordinary judgment from this Court.

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[5] The state repeatedly raises the factbound issue of "conservation necessity," *i.e.*, whether, if the Tribe possesses treaty hunting rights, the state can prove that its hunting regulations as applied to the Crow are justified by conservation necessity. Opp.11, 18, 22, 24-25. But that issue is not before this Court and presents no barrier to review because the court below categorically held that the Crow Tribe had *no* treaty hunting rights. *See* Pet.App.14 n.3 (finding it "unnecessary to address the conservation necessity issue" because "the treaty rights do not exist").

CONCLUSION

The Court should grant the petition.

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No. 17-532

In the Supreme Court of the United States

CLAYVIN HERRERA, PETITIONER

v.

STATE OF WYOMING

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF WYOMING, SHERIDAN COUNTY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Crow Tribe of Indians' right under an 1868 treaty to hunt on "unoccupied lands of the United States" survived Wyoming's admission to the Union.

2. Whether the establishment of a National Forest, in and of itself, renders the lands occupied within the meaning of the 1868 treaty with the Crow Tribe.

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In the Supreme Court of the United States

No. 17-532

CLAYVIN HERRERA, PETITIONER

v.

STATE OF WYOMING

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF WYOMING, SHERIDAN COUNTY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Three centuries ago, the Crow Tribe of Indians (Tribe) migrated from Canada to what is now southern Montana and northern Wyoming. See *Montana* v. *United States*, 450 U.S. 544, 547 (1981); Pet. 4. "In th[e] 19th century, warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851, in which the signatory tribes acknowledged various designated lands as their respective territories." *Montana*, 450 U.S. at 547-548; see Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749; 2 Charles J. Kappler, *Indian Affairs:*

Laws and Treaties 594-595 (1904) (Kappler). That treaty "identified approximately 38.5 million acres as Crow territory." *Montana*, 450 U.S. at 548. It also specified that the tribes did "not surrender the privilege of hunting, fishing, or passing over any of the" designated lands. Kappler 595.

By the 1860s, non-Indians were rapidly settling the lands identified as Crow territory, building roads, driving away game, and taking possession of valuable mines. Institute for the Development of Indian Law, *Proceedings of the Great Peace Commission of 1867-1868*, at 86, 88, 90 (1975). Representatives of the United States, including the Commissioner of Indian Affairs, approached the Tribe with a proposal to "set apart a tract of your country as a home for yourselves and children forever, upon which your great Father will not permit the white man to trespass." *Id.* at 86. As for "the rest" of the Tribe's territory, the United States proposed to "buy * * * the right to use and settle [it]," while "leaving to" the Tribe "the right to hunt upon it as long as the game lasts." *Ibid.*; see *id.* at 90 ("You will still be free to hunt as you are now.").

The United States and the Tribe subsequently signed the Second Treaty of Fort Laramie of 1868. See Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty), May 7, 1868, 15 Stat. 649; *Montana*, 450 U.S. at 548. That treaty "established a Crow Reservation of roughly 8 million acres," *Montana*, 450 U.S. at 548, in present-day Montana "for the absolute and undisturbed use and occupation of the [Tribe]," 1868 Treaty, art. II, 15 Stat. 650. In exchange, the Tribe agreed to cede the rest of its lands, including in present-day Wyoming, to the United States. *Ibid.* The 1868 Treaty expressly provided, however, that the

Tribe would retain certain rights in those ceded lands. In particular, Article IV specified that "they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." *Ibid.*

2. Several months after the 1868 Treaty was signed, Congress created a temporary government for the territory of Wyoming. Act of July 25, 1868, ch. 235, 15 Stat. 178. In 1890, Congress passed an act admitting Wyoming to the Union "on an equal footing with the original States in all respects whatever." Act of July 10, 1890 (Statehood Act), ch. 664, 26 Stat. 222.

3. In 1891, Congress enacted a statute authorizing the President to "set apart and reserve" public lands as forest reservations. Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1103. Exercising that authority in 1897, President Grover Cleveland issued a proclamation "reserv[ing] from entry or settlement and set[ting] apart as a Public Reservation" certain forest areas in northern Wyoming. Proclamation No. 30, 29 Stat. 909-910 ("Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation."). The public reservation encompassed lands bordering Montana, ceded by the Tribe in 1868 and adjacent to the Crow Reservation. Pet. 7. Known today as the Bighorn National Forest, the lands are to be administered "for the purpose of securing favorable conditions of water flows" and "furnish[ing] a continuous supply of timber." 16 U.S.C. 475. They also are to "be administered for outdoor recreation, range, * * * and wildlife and fish purposes." 16 U.S.C. 528.

4. In 1989, a member of the Tribe shot and killed an elk in the Bighorn National Forest. *Crow Tribe of Indians* v. *Repsis*, 73 F.3d 982, 985 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996). After the State of Wyoming prosecuted the tribal member for hunting without a state license, *ibid.*, the Tribe sued Wyoming state officials in federal court, seeking a declaratory judgment that the Tribe and its members have a right under the 1868 Treaty to hunt on "unoccupied lands of the United States," art. IV, 15 Stat. 650, including National Forest lands. See *Repsis*, 73 F.3d at 986.

The Tenth Circuit affirmed the grant of summary judgment for the state officials, concluding that the right to hunt under the 1868 Treaty was "a temporary right which was repealed with Wyoming's admission into the Union." *Repsis*, 73 F.3d at 994; see *id.* at 992. That conclusion rested on this Court's decision in *Ward* v. *Race Horse*, 163 U.S. 504 (1896), involving a virtually identical provision of a treaty with the Bannock Indians. *Id.* at 507; see Treaty Between the United States of America and the Eastern Band of Shoshonees and the Bannack Tribe of Indians (Shoshone-Bannock Treaty), July 3, 1868, art. IV, 15 Stat. 674-675. In *Race Horse*, this Court held that the Bannock Indians' "right" under the treaty "to hunt on the unoccupied lands of the United States," art. IV, 15 Stat. 674, was repealed by what the Court perceived to be a conflict between the treaty and the Statehood Act and thus did not survive Wyoming's admission to the Union "on equal terms with the other States," 163 U.S. at 514. Finding *Race Horse* indistinguishable, the Tenth Circuit held that the Statehood Act likewise repealed the Tribe's treaty-based hunting right. *Repsis*, 73 F.3d at 988-989, 992, 994.

The Tenth Circuit also affirmed the grant of summary judgment on an "alternative basis," which the district court had not reached. *Repsis*, 73 F.3d at 993. Observing that the right to hunt under the 1868 Treaty extends only to "'unoccupied lands,'" the Tenth Circuit held that "since the creation of the national forest," "the lands of the Big Horn National Forest have been 'occupied.'" *Id.* at 994. The Tenth Circuit reasoned that when the 1868 Treaty was executed, "the lands located in what is now the Big Horn National Forest were unoccupied" because "they were open for settlement in the westward expansion of the United States." *Id.* at 993. But, the court continued, when the Bighorn National Forest was created—such that no one could "timber, mine, log, graze cattle, or homestead on the[] lands without federal permission"—the "lands were no longer available for settlement." *Ibid.* On this basis, the court concluded that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land." *Ibid.*

Four years after the Tenth Circuit's decision in *Repsis*, this Court decided *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). The issue in *Mille Lacs* was whether Minnesota's admission to the Union extinguished the Chippewa's rights to off-reservation hunting, fishing, and gathering under an 1837 treaty. *Id.* at 202; see *id.* at 175-176. In considering that question, the Court revisited *Race Horse* and determined that it had "rested on a false premise," *id.* at 204—namely, "that treaty rights are irreconcilable with state sovereignty," *id.* at 205. Rejecting that premise and other aspects of *Race Horse*'s reasoning, *id.* at 205-208, the Court held that the Chippewa's treaty rights survived Minnesota's statehood, *id.* at 202-203, 207-208.

5. Petitioner is a member of the Tribe who lives on the Crow Reservation in Montana. Pet. App. 5. In 2014, he and other members of the Tribe went hunting on the Reservation. *Ibid.* When the elk they were hunting crossed a fence and entered the Bighorn National Forest in Wyoming, petitioner and his companions followed. *Ibid.* There, on land ceded by the Tribe in 1868, they shot and killed three elk. *Ibid.* They then returned with the meat to the Reservation. *Ibid.*

The State of Wyoming cited petitioner for taking an antlered big-game animal during a closed season, and for being an accessory to others' doing the same—both misdemeanors under state law. Pet. App. 5. Petitioner pleaded not guilty and moved to dismiss the citations, contending that in taking the elk, he was exercising his right to hunt on unoccupied lands of the United States under the 1868 Treaty. *Id.* at 36-37.

The state trial court denied the motion to dismiss. Pet. App. 36-43. The court stated that it "agree[d]" with, and was "bound by," the Tenth Circuit's holding in *Repsis* that "Crow Tribe members do not have off-reservation treaty hunting rights anywhere within the state of Wyoming." *Id.* at 38. The court also stated that even "if [petitioner] had the off-reservation right to hunt, the state of Wyoming may regulate that right in the interest of conservation," *id.* at 39, and petitioner "is subject to th[ose] state regulations," *id.* at 40. Finding an evidentiary hearing unnecessary, *id.* at 37, the court canceled the hearing that had been scheduled, *id.* at 43.

Thereafter, a jury found petitioner guilty of both crimes charged. Pet. App. 9. Petitioner received a one-year suspended jail sentence and a three-year suspension of hunting privileges. *Ibid.* He was also ordered to pay $8080 in fines and costs. *Ibid.*

6. The Wyoming district court affirmed. Pet. App. 3-35.

The Wyoming district court concluded that petitioner was precluded under the doctrine of collateral estoppel from "attempting to relitigate the validity of the off-reservation treaty hunting right that was previously held to be invalid in the *Repsis* case." Pet. App. 31. Recognizing application of the doctrine to be a matter of federal law, *id.* at 12, the court found each of the prerequisites to issue preclusion satisfied, including that "the ultimate issue in the two cases is identical," *id.* at 13-14, and that petitioner is "in privity" with a party to the prior adjudication (namely, the Tribe), *id.* at 17. The court also rejected petitioner's contention that *Repsis* should be denied preclusive effect because *Mille Lacs* constituted "an intervening change in the applicable legal context." *Id.* at 20. In the court's view, "*Mille Lacs* did not change the fundamental legal principles applicable to the interpretation of treaties." *Id.* at 24.

The Wyoming district court further concluded that "[e]ven if collateral estoppel did not apply in this case, there are other grounds appearing in the record that support affirming the [trial] court's decision." Pet. App. 31. In particular, the Wyoming district court found that it was "appropriate" for the trial court to "adopt the analysis and conclusions" of the Tenth Circuit's decision in *Repsis*, *id.* at 34, which had held that the "Tribe's right to hunt * * * was repealed by the act admitting Wyoming into the Union" and that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land," *id.* at 33 (quoting *Repsis*, 73 F.3d at 992-993).

The Wyoming Supreme Court denied review. Pet. App. 1-2.

DISCUSSION

This case presents two important questions regarding the Tribe's right under the 1868 Treaty to hunt on "unoccupied lands of the United States": (1) whether that right survived Wyoming's statehood, and (2) whether National Forest lands may be considered "unoccupied." Art. IV, 15 Stat. 650. The Wyoming district court's decision, which answered both questions in the negative, is contrary to *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), and the decisions of other lower courts. Although the Wyoming district court relied in part on the doctrine of collateral estoppel, that doctrine poses no obstacle to review. The petition for a writ of certiorari should be granted.

A. The Decision Below Is Incorrect

In *Crow Tribe of Indians* v. *Repsis*, 73 F.3d 982 (1995), cert. denied, 517 U.S. 1221 (1996), the Tenth Circuit concluded (1) that the Tribe's hunting right under the 1868 Treaty was repealed by the Act of Congress admitting Wyoming to the Union, and (2) that National Forest lands are not "unoccupied" within the meaning of the Treaty. *Id.* at 994. The Wyoming district court in this case found it "appropriate" for the state trial court to "adopt" those "conclusions of the *Repsis* case." Pet. App. 34. Neither conclusion, however, is correct.

1. The Crow Tribe's hunting right under the 1868 Treaty survived Wyoming's admission to the Union

The 1868 Treaty did not provide for the termination of the Tribe's hunting right upon the admission of a State. Nor was that right repealed by Wyoming's Statehood Act.

a. The "starting point" for interpreting a treaty "is the treaty language itself." *Mille Lacs*, 526 U.S. at 206.

"The Treaty must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians." *Ibid.*

Article IV of the 1868 Treaty provides that the Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 15 Stat. 650. The treaty itself thus "defines the circumstances under which the right[] would terminate," *Mille Lacs*, 526 U.S. at 207: (1) when "the hunting grounds" are no longer "unoccupied and owned by the United States," *ibid.*; (2) when "game" may no longer be "found thereon," 1868 Treaty, art. IV, 15 Stat. 650; or (3) when "peace" no longer "subsists among the whites and Indians on the borders of the hunting districts," *ibid.* Wyoming's admission to the Union is not one of those circumstances. The 1868 Treaty thus gives no indication that the right would terminate "when a State was established in the area." *Mille Lacs*, 526 U.S. at 207.

Nor is there any indication that Congress abrogated the Tribe's treaty rights in admitting Wyoming to the Union. "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202 (citing *United States* v. *Dion*, 476 U.S. 734, 738-740 (1986)). Wyoming's Statehood Act provides: "[T]he State of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever." 26 Stat. 222. That language "makes no mention of Indian treaty rights," and "it provides no clue that Congress considered the reserved rights of the [Tribe] and decided to abrogate those rights when it passed the

Act." *Mille Lacs*, 526 U.S. at 203. The Tribe's treaty rights therefore survived Wyoming's statehood.

b. *Ward* v. *Race Horse*, 163 U.S. 504 (1896), relied upon by the Tenth Circuit in *Repsis*, does not compel a different result in light of this Court's subsequent decision in *Mille Lacs*.

i. The Court in *Mille Lacs* described *Race Horse* as consisting of two "alternative" holdings. *Mille Lacs*, 526 U.S. at 206; see *id.* at 203-208. *Race Horse* first held that Wyoming's Statehood Act "repeal[ed]" the treaty right of the Bannock Indians to "hunt on unoccupied lands of the United States." 163 U.S. at 514. That holding rested on the premise that the treaty right was "irreconcilable" with the Statehood Act. *Ibid.* *Race Horse* noted that the Act admitted Wyoming to the Union "on equal terms with the other States." *Ibid.* And *Race Horse* stated that one of the powers enjoyed by "all the States" is the power "to regulate the killing of game within their borders." *Ibid.* *Race Horse* thus reasoned that if the Shoshone-Bannock Treaty "was so construed as to allow the Indians to * * * disregard and violate" Wyoming's hunting laws, *id.* at 511, Wyoming "will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union," *id.* at 514. *Race Horse* held that "the repeal" of the treaty right "result[ed] from th[at] conflict." *Ibid.*

Race Horse "alternative[ly]" held that "[t]he treaty rights at issue were not intended to survive Wyoming's statehood" in the first place. *Mille Lacs*, 526 U.S. at 206. *Race Horse* assumed that it would be "within the power of Congress" to create treaty rights that survived a State's "admission into the Union." 163 U.S. at 515. But *Race Horse* declined to construe the Shoshone-Bannock

Treaty as recognizing such a "perpetual right." *Ibid.* Noting that under the terms of the treaty itself, the hunting right would "cease whenever the United States parted merely with the title to any of its lands," *Race Horse* determined that the treaty should be construed as conveying only a "temporary and precarious" right, *ibid.*, which would not "conflict with" the Statehood Act or be "destructive of the rights of one of the States," *id.* at 516.

ii. This Court has since expressly repudiated *Race Horse*'s reasoning. As the Court in *Mille Lacs* explained, *Race Horse*'s "equal footing holding" rested on a "false premise." 526 U.S. at 204-205. Contrary to *Race Horse*, "an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State." *Id.* at 204. "Rather, Indian treaty rights can coexist with state management of natural resources." *Ibid.* Given that the two are "reconcilable," "statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." *Id.* at 205.

The Court in *Mille Lacs* also rejected the reasoning behind *Race Horse*'s alternative holding that the treaty rights at issue were not intended to continue past statehood. *Mille Lacs*, 526 U.S. at 206-207. That holding, the Court explained, was likewise informed by *Race Horse*'s erroneous conclusion that "the Indian treaty rights were inconsistent with state sovereignty over natural resources." *Id.* at 207-208. The Court also noted that *Race Horse* had viewed the "right to hunt on federal lands" as "temporary because Congress could terminate the right at any time by selling the lands." *Id.* at 207. But "[u]nder this line of reasoning," the Court

explained, "any right created by operation of federal law could be described as 'temporary and precarious,' because Congress could eliminate the right whenever it wished." *Ibid.* *Mille Lacs* thus rejected "the 'temporary and precarious' language in *Race Horse* [a]s too broad to be useful in distinguishing rights that survive statehood from those that do not." *Id.* at 206.

Mille Lacs instructs courts to focus instead on what the treaty "itself defines [as] the circumstances under which the rights would terminate." 526 U.S. at 207. And given that Wyoming's statehood is not one of those circumstances specified by the 1868 Treaty, see p. 9, *supra*, the Tenth Circuit in *Repsis*, as well as the courts below in this case, erred in holding that the Tribe's hunting right terminated upon Wyoming's admission to the Union.

2. The establishment of a National Forest, in and of itself, does not render the lands occupied within the meaning of the 1868 Treaty

Under the 1868 Treaty, the Tribe's hunting right extends only to "unoccupied lands of the United States." Art. IV, 15 Stat. 650. The Tenth Circuit in *Repsis* determined that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land" because the land could no longer be settled. 73 F.3d at 993. Under the 1868 Treaty, however, "unoccupied lands" refers to lands that have not actually been settled. Thus, the creation of the Bighorn National Forest, in and of itself, did not render those lands occupied.

a. Although the 1868 Treaty does not define the term "unoccupied lands," the text of the treaty indicates that the parties understood the term to mean lands not settled by "the whites." Art. IV, 15 Stat. 650. The text provides that "[t]he Indians * * * shall have the right to hunt on the unoccupied lands of the United States

* * * as long as peace subsists among the whites and Indians on the borders of the hunting districts." *Ibid.* The "borders of the hunting districts" thus mark not only where the Tribe may hunt; they also mark the line dividing "the whites and Indians." *Ibid.* It follows that as "the whites" settled more land, those "borders" would shrink and the land would become "[]occupied." *Ibid.* Conversely, as long as the land had not been settled, it would remain "unoccupied." *Ibid.*

The historical record supports that understanding of that term. During subsequent consideration of a bill to make appropriations to fulfill the United States' obligations under the 1868 Treaty, Senator Harlan reminded his colleagues that the Treaty permitted "the[] Indians to hunt, so long as they can do so without interfering with the settlements." Cong. Globe, 40th Cong., 3d Sess. 1348 (1869). Senator Harlan explained: "So long as outside lands, outside of the reservation, may not be occupied by settlements, and may be occupied by game, they may hunt the game." *Ibid.*

A representative of the United States echoed that interpretation during negotiations to secure further cessions of land from the Tribe. See Act of Mar. 3, 1873, ch. 321, 17 Stat. 626. Addressing members of the Tribe, the U.S. representative described the 1868 Treaty as allowing "the Crows" to hunt "where there are not too many whites." U.S. Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1873*, at 135 (1874); see *id.* at 132 (stating that the Treaty allowed "the Crows" to hunt "as long as there are any buffalo, and as long as the white men are not here * * * with farms"). The historical record thus indicates that the parties understood "unoccupied lands" to refer to lands

"the whites" had not settled. 1868 Treaty, art. IV, 15 Stat. 650.

b. Given that understanding, the fact that an area has been designated as a National Forest does not render that area occupied. Quite the opposite, the creation of the Bighorn National Forest meant that those "lands were no longer available for settlement." *Repsis*, 73 F.3d at 993. Indeed, the President's proclamation setting apart those lands "expressly" "[w]arn[ed]" "all persons not to * * * make settlement upon" them. Proclamation No. 30, 29 Stat. 910.

Moreover, hunting is not inherently incompatible with an area's designation as National Forest land. See 36 C.F.R. 261.8 (prohibiting hunting in National Forests only "to the extent Federal or State law is violated"). The U.S. Forest Service recognizes that certain tribes may have "off-reservation treaty rights," including "rights to hunt," on lands within the National Forest System. U.S. Forest Serv. (FS), U.S. Dep't of Agric. (USDA), *Forest Service Manual* § 1563.8b(1) (2016). And the Forest Service has committed to administering such lands "in a manner that protects Indian tribes' rights and interests in the resources reserved under the treaty." *Ibid.*; see, *e.g.*, FS, USDA, *Memorandum of Understanding Regarding Tribal-USDA-Forest Service Relations on National Forest Lands Within the Territories Ceded in Treaties of 1836, 1837, and 1842* (Mar. 2012), https://www.fs.fed.us/spf/tribalrelations/documents/agreements/mou_amd2012wAppendixes.pdf (providing a cooperative framework for the exercise of treaty-based hunting rights by the Lake Superior Chippewa Indians on National Forest lands).

This is not to say that the Forest Service would be barred from administering a particular tract of National Forest land in such a way that rendered it occupied within the meaning of the treaty. See *State* v. *Cutler*, 708 P.2d 853, 856 (Idaho 1985) (explaining that the "federal government is not necessarily foreclosed from using specific tracts of lands in such a manner that the signatory Indians to treaties would have understood the lands to be claimed, settled or occupied"). But the Tenth Circuit in *Repsis* concluded that the establishment of the Bighorn National Forest, by itself, rendered the land occupied, without considering the uses to which the Forest Service had put any particular tract. 73 F.3d at 993. And the courts below simply adopted that analysis, without considering the circumstances of this particular case. Pet. App. 34, 38; see *id.* at 37 (finding "[n]o evidentiary hearing" "warranted" because "[t]he decision on the matter of off-reservation treaty hunting rights is based in law and not in fact"). The decision below therefore rests on the mistaken legal conclusion that federal lands become "'occupied' simply by virtue of being declared a national forest." Pet. 21 (citation omitted).

B. The Questions Presented Have Generated Disagreement In The Lower Courts

1. This Court's review is warranted to resolve disagreement in the lower courts on both the continuing effect and scope of *Race Horse* and the meaning of "unoccupied lands." In cases involving the same treaty at issue in *Race Horse*—which, like the 1868 Treaty at issue here, reserves to "Indians * * * the right to hunt on the unoccupied lands of the United States," Shoshone-Bannock Treaty, art. IV, 15 Stat. 674—the Idaho Su-

preme Court and the Ninth Circuit have rendered decisions contrary to *Repsis* and the decision below. See *Shoshone-Bannock Tribes* v. *Fish & Game Comm'n*, 42 F.3d 1278 (9th Cir. 1994); *State* v. *Tinno*, 497 P.2d 1386 (Idaho 1972).

Even prior to *Mille Lacs*, the Idaho Supreme Court in *Tinno* concluded that "*Race Horse* and the theory it posited ha[d] been entirely discredited by the Supreme Court." 497 P.2d at 1392 n.6 (citing *Tulee* v. *Washington*, 315 U.S. 681 (1942), and *United States* v. *Winans*, 198 U.S. 371 (1905)).* The court in *Tinno* thus declined to allow the State to prosecute a tribal member for taking fish on the theory that the statute admitting Idaho to the Union "superseded" the Indians' treaty right. *Ibid.*; see *id.* at 1389-1390 (construing the hunting right to encompass fishing). The court also accepted the parties' stipulation that National Forest land was "unoccupied land of the United States," noting that "[a] plain reading of the treaty provision would lead to the conclusion that there is no serious geographical question presented." *Id.* at 1391; see also *Cutler*, 708 P.2d at 856 (explaining that the court in *Tinno* "agreed" that the "National Forest" land was "'unoccupied'").

The Ninth Circuit's decision in *Shoshone-Bannock* likewise conflicts with *Repsis* and the decision below. In that case, the Shoshone-Bannock Tribes sued an Idaho official under 42 U.S.C. 1983, seeking damages for an

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* The United States filed an amicus brief in *Tinno*, *supra* (No. 10737), arguing (at 19-20) that the theory of *Race Horse* had been repudiated by, *inter alia*, *Tulee* and *Winans*. *Tinno* was decided well before *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989), which admonished lower courts to "leav[e] to this Court the prerogative of overruling its own decisions." *Id.* at 484.

alleged violation of their right under the Shoshone-Bannock Treaty to "hunt on the unoccupied lands of the United States." 42 F.3d at 1280 (citation omitted). In considering whether the defendant was entitled to qualified immunity, the Ninth Circuit held that "[t]he Tribes' right is and was clearly established." *Id.* at 1286. Citing *Tinno*, the Ninth Circuit explained that "[f]or more than twenty years," the treaty "has been interpreted to reserve to the Tribes the right to fish on unoccupied lands of the United States." *Ibid.*

Thus, unlike *Repsis* and the decision below, the Idaho Supreme Court and the Ninth Circuit have continued to recognize a right to hunt on "unoccupied lands" following statehood, notwithstanding *Race Horse*. Because *Race Horse* is a decision of this Court, only this Court can definitively resolve questions concerning the continuing effect and scope of that decision. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

2. *Repsis* and the decision below are also in tension with the Montana Supreme Court's decision in *State* v. *Stasso*, 563 P.2d 562 (1977). That case involved a treaty that reserved to certain tribes "the privilege of hunting * * * upon open and unclaimed land." Treaty Between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, July 16, 1855, art. III, 12 Stat. 976. Although the language of that treaty differs from that of the 1868 Treaty here, the court in *Stasso* defined the term "open and unclaimed lands" to mean lands "'not settled and occupied by the whites.'" 563 P.2d at 565 (quoting *State* v. *Arthur*, 261 P.2d 135, 141 (Idaho 1953), cert. denied, 347 U.S. 937 (1954)). The court then concluded that the "National Forest lands" at issue in the case met that definition, implying that it viewed

those lands as "'not * * * occupied,'" despite their designation as National Forest. *Ibid.* (quoting *Arthur*, 261 P.2d at 141); see also *State* v. *Buchanan*, 978 P.2d 1070, 1076, 1082 (Wash. 1999) (en banc) (concluding that a state-owned wildlife area was "obviously unoccupied" and thus "open and unclaimed" within the meaning of a treaty with the Nooksack Indian Tribe), cert. denied, 528 U.S. 1154 (2000).

C. This Case Is A Suitable Vehicle For Resolving The Questions Presented

1. The State contends (Br. in Opp. 14-22) that petitioner is precluded from relitigating the issues in this case. That contention is unpersuasive.

a. In addition to holding that it was "appropriate" for the trial court to "adopt" the "conclusions" of the Tenth Circuit in *Repsis*, Pet. App. 34, the Wyoming district court concluded that petitioner was precluded from relitigating one of the issues the Tribe lost in that case: whether the Tribe's "off-reservation treaty hunting right" "was no longer valid" because "the right was intended to be temporary in nature," *id.* at 14. We may assume for present purposes that a civil judgment against a tribe in a suit seeking to establish rights under its treaty would ordinarily bind an individual tribal member in a criminal case. See *id.* at 15-18, 24-31. But in this case, the Wyoming district court's reliance on the doctrine of collateral estoppel was misplaced.

Collateral estoppel (or issue preclusion) "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment.'" *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted). That rule, however, is not absolute. This Court has held that "even where the core requirements of issue preclusion are met, an

exception to the general rule may apply when a 'change in the applicable legal context' intervenes." *Bobby* v. *Bies*, 556 U.S. 825, 834 (2009) (brackets and citation omitted).

That exception applies here. In *Repsis*, the Tenth Circuit relied on *Race Horse* as "conclusively establish[ing] that 'the right to hunt on all unoccupied lands of the United States * * * ' reserved a temporary right which was repealed with Wyoming's admission into the Union." 73 F.3d at 994 (citation omitted). But after *Repsis* was decided, the "applicable legal context" changed. *Bobby*, 556 U.S. at 834 (citation omitted). As explained above, see pp. 11-12, *supra*, *Mille Lacs* expressly repudiated *Race Horse*'s conclusion that "treaty rights are irreconcilable with state sovereignty" and are thus "extinguish[ed]" upon statehood. *Mille Lacs*, 526 U.S. at 205. And contrary to the State's contention (Br. in Opp. 6-7, 20-21), *Mille Lacs* specifically rejected the line between "perpetual" and "temporary" rights that *Race Horse* relied upon in holding that the treaty rights at issue were not intended to survive Wyoming's admission to the Union. *Race Horse*, 163 U.S. at 515; see *Mille Lacs*, 526 U.S. at 206-207. *Mille Lacs* thus changed the applicable legal context with respect to both of *Race Horse*'s rationales. And because *Repsis* relied on *Race Horse* to conclude that the 1868 Treaty "reserved a temporary right which was repealed with Wyoming's admission into the Union," 73 F.3d at 994, that conclusion is not entitled to preclusive effect.

For that reason, issue preclusion should pose no barrier to this Court's review of whether the Tribe's treaty right survived Wyoming's statehood. In any event, the application of issue preclusion is "inextricably intertwined" with the merits of that question, for the continuing effect or scope of *Race Horse* is central to both.

Pet. Reply Br. 11. This case is thus an appropriate vehicle for review of that question.

b. The State also contends (Br. in Opp. 17-18) that issue preclusion poses an obstacle to this Court's review of whether the establishment of the Bighorn National Forest rendered the land occupied under the 1868 Treaty. That contention is likewise mistaken.

It is true that the Tenth Circuit in *Repsis* concluded that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land." 73 F.3d at 993. But that was an "alternative basis for affirmance"; the federal district court in *Repsis* had "not reach[ed] th[e] issue" of whether "the lands of the Big Horn National Forest are 'occupied.'" *Ibid.* The only treaty-related question the federal district court addressed was whether the treaty right "was no longer valid" because "the right was intended to be temporary in nature." Pet. App. 14; see *Crow Tribe of Indians* v. *Repsis*, 866 F. Supp. 520, 522-524 (D. Wyo. 1994).

The Wyoming district court in this case recognized that issue preclusion may extend only to adjudications "necessary to the [prior] judgment," and it viewed the relevant "judgment" as that of the "federal district court" in *Repsis*. Pet. App. 14 (citation omitted). The Wyoming district court found "necessary to that judgment" the federal district court's determination that the treaty right "was intended to be temporary in nature." *Ibid.* But the Wyoming district court did not identify any other adjudication that was "necessary to the judgment." *Ibid.* (citation omitted). Thus, while the court affirmed the state trial court's adoption of the Tenth Circuit's alternative holding on the merits, *id.* at 33-34, it did not give the Tenth Circuit's alternative holding preclusive effect. Issue preclusion therefore would not

stand in the way of this Court's review of whether the establishment of the Bighorn National Forest rendered the land "unoccupied."

c. The State further errs in contending (Br. in Opp. 17-18) that this Court should not grant review of the questions presented because of the possibility of issue preclusion on a third issue the State argues was decided by the Tenth Circuit in *Repsis*, 73 F.3d at 993: whether enforcement of Wyoming's hunting laws against petitioner is "reasonable and necessary for conservation." The Wyoming district court did not address that issue, let alone resolve it on the basis of issue preclusion. Pet. App. 14 n.3, 25 n.7. As the court explained, the issue would arise only if petitioner has a "valid" treaty right, and here, the court concluded that he does not. *Id.* at 25 n.7. Should this Court grant review and reverse on the questions presented, whether the State can meet the demanding "'conservation necessity' standard" on the facts of this case could appropriately be considered on remand. *Mille Lacs*, 526 U.S. at 205.

2. Finally, the State argues (Br. in Opp. 22) that this case lacks a "proper record" for further review. The questions presented, however, are purely legal in nature. Indeed, the state trial court itself determined that an evidentiary hearing was unnecessary after resolving petitioner's motion to dismiss on legal grounds. Pet. App. 37. An evidentiary hearing on other issues—such as whether the Forest Service used the particular land at issue here in a manner that rendered it occupied, or whether the State's hunting laws are necessary for conservation—would be appropriate on remand if this Court were to reverse the decision below. But no further development of the record is necessary for this

Court to review the legal issues presented in the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2018

RECORD
AND
BRIEFS

No. 17-532

In The
Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Petition For Writ Of Certiorari To The District Court Of Wyoming, Sheridan County

BRIEF OF THE CROW TRIBE OF INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The Crow Tribe of Indians respectfully submits this *amici curiae* brief in support of Petitioner.[1]

INTERESTS OF *AMICUS CURIAE*

Amicus Curiae the Crow Tribe of Indians ("Tribe")[2] is a sovereign, federally recognized Indian tribe with more than 14,000 members. More than 9,000 of those members reside on the Crow Indian Reservation ("Reservation"), which is located in southern Montana, adjacent to both the Northern Cheyenne Indian Reservation (to the east) and the State of Wyoming ("Respondent") (to the south). The Tribe is governed by the Crow Tribal General Council, consisting of all adult members of the Tribe, through a tripartite government with executive, legislative, and judicial branches. Const. and Bylaws of the Crow Tribe of Indians (hereinafter, "Crow Tribe Const."), art. I, *available at* http://www.crow-nsn.gov/constitutions-and-bylaws.html.

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[1] In accordance with Rule 37.2 of the Rules of the Supreme Court, counsel of record for all parties received timely notice of this brief and provided their written consent. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The name of the Tribe, in its own language, is Apsaalooke. Apsaalooke and Crow are interchangeable and refer to the same indigenous tribal people and its federally recognized tribal government.

Clayvin B. Herrera ("Petitioner") is a member of the Tribe. This case arises from Petitioner's exercise of his off-reservation hunting rights, as expressly reserved by the Tribe in treaties negotiated with the United States, and reaffirmed in negotiated statutes enacted by Congress.

This case is of critical importance to the Tribe and its members. Some 150 years after the Fort Laramie Treaties were executed, subsistence hunting remains vital to the Tribe's members, who hunt both on the Reservation and off-reservation, including in the two national forests adjacent to the Reservation. The decision below, if upheld, would undermine the Tribe's treaty-guaranteed off-reservation hunting right in Wyoming, notwithstanding that Congress has never abrogated that right but instead has reaffirmed it. In so doing, the decision below would significantly curtail both the lands upon which the Tribe's members can hunt and the game available to them for their subsistence. It is imperative that this Court review, and reverse, the decision below.

SUMMARY OF ARGUMENT[3]

First, the decision below is in conflict with the State courts of last resort that have addressed an important question of purely Federal law – and upon

[3] *Amicus* fully support the reasons set forth by Petitioner for granting *certiorari* in this case, and offers the following additional analysis.

which the Ninth and Tenth Circuit Courts of Appeal are split – which should be decided by this Court: When a tribe has reserved by treaty the right to hunt on "unoccupied lands of the United States," may that tribe's members exercise that right on National Forest lands? At least nineteen tribes, in at least a dozen treaties, reserved for their members off-reservation hunting rights akin to the one at issue here, and all of those tribes are located near, if not adjacent to, National Forest lands. Scores of other tribes with off-reservation hunting rights also are located near or adjacent to National Forest lands. The status of Federally-guaranteed treaty hunting rights on Federal lands should not vary from State to State. This conflict is particularly problematic for *amicus*, whose Reservation borders National Forest lands in two different States that are on opposite sides of this legal issue.

Second, the decision below is inconsistent with a long line of decisions by this Court concerning Indian treaty abrogation and interpretation. This Court's opinion in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), reaffirmed what this Court has said in many cases: that if Congress is to abrogate a treaty right it "must clearly express its intent to do so. . . ." *Id.* at 202. Notwithstanding this Court's governing precedent, the decision below determined that the Tribe's off-reservation hunting right was abrogated without identifying any act of Congress that expressly did so. In addition, *Mille Lacs* reaffirms that treaty provisions must be interpreted as the Indians would have understood them. *Id.* at 196. The decision

below, however, uncritically accepts the proposition that the Treaty between the United States of America and the Crow Tribe of Indians, 15 Stat. 649 (1868) (hereinafter "1868 Treaty"), "clearly contemplated" that the Tribe's off-reservation hunting right would terminate upon the admission of Wyoming to the Union, but provides no evidence for this conclusion. To the contrary, historical evidence indicates that the Tribe's representatives at the treaty negotiations never would have interpreted the treaty as did the court below. The decision below relied exclusively on the holding in *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), notwithstanding that *Mille Lacs* markedly limited (if not outright repudiated) the case upon which *Repsis* relied, *Ward v. Race Horse*, 163 U.S. 504 (1896).

Amicus urges this Court to grant the Petition for Writ of Certiorari and reverse the judgment below.

HISTORICAL BACKGROUND

1. Prior to contact with non-Indians, the Crow were a nomadic people who depended on buffalo, elk, antelope, and deer for food, shelter, clothing, and many other uses. Frederick E. Hoxie, *The Crow* 24 (1989). The Tribe's traditional homelands around the period of initial contact with non-Indians encompassed an area that now comprises parts of Montana, Wyoming, and the Dakotas. *Montana v. United States*, 450 U.S. 544, 547 (1981); Treaty of Fort Laramie, 11 Stat. 749 (1851)

and 2 C. Kappler, Indian Affairs: Laws and Treaties 594 (1904) (hereinafter "1851 Treaty").[4]

2. "In the 19th century, warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851, in which the signatory tribes acknowledged various designated lands as their respective territories." *Montana*, 450 U.S. at 547-48 (citing 1851 Treaty). In delineating their individual territories, however, the 1851 Treaty's signatory tribes "[did] not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 1851 Treaty, art. 5, 2 C. Kappler 595.

3. The United States and the Tribe met again at Fort Laramie in 1867 to negotiate a treaty. *See generally Proceedings of the Great Peace Commission of 1867-1868* (Vine Deloria, Jr. and Raymond DeMallie eds. 1975) (hereinafter "*Proceedings*"). On November 12, 1867, Commissioner of Indian Affairs N.G. Taylor

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[4] The 1851 Treaty identified the Tribe's territory as follows:

> [C]ommencing at the mouth of the Powder River on the Yellowstone; thence up [the] Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth.

1851 Treaty art. 5, 2 C. Kappler at 595.

explained to the Tribe's representatives the United States' purpose:

> We desire to set apart a tract of your country as a home for yourselves and your children forever, upon which your great Father will not permit the white man to trespass. We wish you to make out a section of country that will suit you for this purpose. When that is set apart, we desire to buy of you the right to use and settle the rest, *leaving to you, however, the right to hunt upon it as long as the game lasts.*

Id. at 86 (emphasis added). Three representatives of the Tribe, Bear's Tooth, Black Foot, and Wolf Bow, each expressed their desire for peace with the United States, but also the importance of maintaining their way of life, including the hunt. *See, e.g.*, *id.* at 88 (quoting Bear's Tooth: "You talk about farming for me and raising stock. I don't like to hear that. I was raised on game and I would like to live as I was raised. . . . We want to kill our own game and be glad. All of the Crows feel as I do."). The following day, Bear's Tooth told the treaty commissioners that he would bring the United States' offer to the Tribe. *Id.* at 91.

The following spring, the Tribe and the United States executed the 1868 Treaty, which set forth the boundaries of the Tribe's original Reservation on the southern border of the Montana Territory. 15 Stat. at 650 art. II. In that treaty, the Tribe reserved for itself "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon,

and as long as peace subsists among the whites and Indians on the borders of the hunting districts." *Id.* at 650 art. IV.

4. Since the execution of the 1868 Treaty, the Tribe's members have exercised their right to hunt off their Reservation on unoccupied lands of the United States, including in the Bighorn National Forest. In 1989, Thomas L. Ten Bear, a Crow Tribal member, was cited by Wyoming State authorities for killing an elk in the Bighorn National Forest without a hunting license, and the United States Court of Appeals for the Tenth Circuit upheld his conviction. *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995). Relying on this Court's opinion in *Ward v. Race Horse*, 163 U.S. 504 (1896), the Tenth Circuit held that "[t]he Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming to the Union." *Repsis*, 73 F.3d at 992. In the alternative, the Tenth Circuit held that, as a result of the creation of the Bighorn National Forest, that Forest's lands were no longer "unoccupied lands of the United States" upon which the Tribe's members could exercise their treaty-guaranteed off-reservation hunting right. *Id.* at 993.

The viability of *Repsis* was fatally undermined when this Court decided *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). In the face of Minnesota's reliance on *Repsis* (and *Race Horse*), in *Mille Lacs* this Court held that "*Race Horse* rested on a false premise," and that "Indian treaty rights can co-exist with state management of natural resources." *Id.* at 204. In light of *Mille Lacs* having repudiated *Race*

Horse (and, thus, the underpinnings of *Repsis*), the Tribe adopted a resolution declaring the policy of the Tribe to fully exercise the off-reservation hunting rights reserved by the 1868 Treaty, including in the Bighorn National Forest, and formally notified the States of Wyoming, Montana, and South Dakota of this policy. Crow Tribe Joint Action Resolution No. 13-09 (May 7, 2013).

5. As set forth in greater detail by Petitioner, *see* Pet.9-12, in January 2014 Petitioner and other members of the Tribe went hunting on the Reservation in order to provide food for their families and other tribal members. The group espied a small group of elk on the Reservation, followed it across the Montana-Wyoming state line into the Bighorn National Forest, killed, quartered, and packed three elk, and carried them back to the Reservation. Subsequently, Petitioner was cited for taking antlered big game during a closed-hunting season and for being an accessory to the same. Petitioner moved to dismiss on the grounds that his treaty-guaranteed off-reservation hunting right allowed him to hunt in the Bighorn National Forest. The Wyoming Circuit Court denied the motion, holding that it was "bound by" the Tenth Circuit's decision in *Repsis*, breathing life into a decision that had appeared dead for sixteen years. The Wyoming court concluded that this Court's opinion in *Mille Lacs* "had no effect on the *Repsis* decision," and barred Petitioner from asserting his treaty right at trial. Petitioner was convicted on both charges; he was fined $8,000 and given a one-year suspended jail sentence, and his hunting privileges were suspended for three years. In April

2017, a single judge on the Wyoming District Court, acting in an intermediate appellate capacity, affirmed the Wyoming Circuit Court. Petitioner timely appealed to the Wyoming Supreme Court, which denied review without explanation in a one-page order.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS BY STATE COURTS OF LAST RESORT AND WITH THE NINTH CIRCUIT ON AN IMPORTANT FEDERAL QUESTION: WHETHER NATIONAL FORESTS CONSTITUTE "UNOCCUPIED" LANDS FOR PURPOSES OF TRIBAL TREATY HUNTING RIGHTS.

A. The status of tribal treaty hunting rights on National Forest lands is an important question of Federal law affecting not only *amicus*, but also numerous other tribes.

1. At least nineteen tribes, in at least a dozen treaties, reserved for themselves the right to hunt on Federal lands away from their respective reservations. In the 1868 Treaty, the Tribe reserved its right to hunt on "unoccupied lands of the United States." 15 Stat. at 650 art. IV. The same year, the Navajo and the Shoshonee[5] and Bannock Tribes also reserved

[5] In the interest of clarity, this Brief, when referring to a treaty, spells the names of the tribes party to that treaty the way they appear in the treaty.

off-reservation hunting rights on "unoccupied" Federal lands.[6] Similarly, the Walla-Walla, Cayuses, and Umatilla Tribes reserved their right to hunt on "unclaimed lands."[7] And at least a dozen tribes in eight different treaties reserved for their members the right to hunt on "open and unclaimed land[s]."[8] All of these treaties – particularly those of tribes who hunt on National Forest lands located within the federal Tenth Circuit – are implicated by the decision below.

2. Most, if not all, of the aforementioned tribes are located near, if not adjacent to, National Forest lands. In addition, scores of other tribes throughout the

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[6] Treaty between the United States of America and the Navajo Tribe of Indians, 15 Stat. 667, 670 art. IX (1868); Treaty between the United States of America and the Eastern Band of Shoshonees and the Bannock Tribe of Indians, 15 Stat. 673, 674-75 art. IV (1868).

[7] Treaty between the United States and the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, 12 Stat. 945, 946 art. I (1855).

[8] Treaty with Nisquallys, &c, 10 Stat. 1132, 1133 art. III (1854); Treaty between the United States and the Duwamish, Suquamish, and other allied and subordinate Tribes of Indians in Washington Territory, 12 Stat. 927, 928 art. V (1855); Treaty between the United States of America and the S'Klallams Indians, 12 Stat. 933, 934 art. IV (1855); Treaty between the United States of America and the Makah Tribe of Indians, 12 Stat. 939, 940 art. IV (1855); Treaty between the United States and the Yakama Nation of Indians, 12 Stat. 951, 952 art. III (1855); Treaty between the United States of America and the Nez Percé Indians, 12 Stat. 957, 958 art. III (1855); Treaty between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, 12 Stat. 975, 976 art. III (1855) (hereinafter "Treaty of Hell Gate"); Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians, 12 Stat. 971, 972 art. III (1856).

United States with treaty-guaranteed off-reservation hunting rights are located near or adjacent to National Forest lands within which they reserved rights to hunt, fish, or otherwise gather resources needed for the subsistence of those tribes or their members. In each of those instances, the status of treaty hunting rights on those lands is a purely Federal question, the answer to which should not vary from state to state. Consequently, certiorari is warranted and necessary to resolve this important question.

B. The decision below exacerbates an untenable split in authority on this important question of Federal law.[9]

Amicus is uniquely positioned to feel the effects of the split in authority between the Ninth and Tenth Circuits noted below, and the disagreement between the Wyoming decision here and the contrary decisions by State courts of last resort in Montana, Idaho, and

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[9] Petitioner ably demonstrates this disagreement between the Wyoming decision below on the one hand, and Idaho (*State v. Tinno*, 249 P.2d 1386, 1389-90 (Idaho 1972); *State v. Arthur*, 261 P.2d 135, 141 (Idaho 1953)), Montana (*State v. Stasso*, 563 P.2d 562, 565 (Montana 1977)), and Washington (*State v. Buchanan*, 978 P.2d 1070, 1081 (Wash. 1999) (citing *State v. Miller*, 689 P.2d 81, 82 n.2 (Wash. 1984)) on the other, and between the Tenth and Ninth Circuits represented by *Repsis* and, *inter alia*, *Swim v. Bergland*, 696 F.2d 712, 714 (9th Cir. 1983). Pet.24-27. In the interest of brevity, *amicus* will not repeat that argument here. However, because its Reservation is adjacent to two National Forests in states that are on opposite sides of this disagreement, *amicus* is uniquely positioned to demonstrate the practical effects of the dispute.

Washington on the question of whether National Forest lands constitute "unoccupied lands of the United States" upon which the Tribe and its members may exercise off-reservation hunting rights. As a result of this split, the Tribe's members are subject to criminal penalties for engaging in treaty-guaranteed off-reservation hunting in one state, despite the same hunting being sanctioned by another. That also makes this case an especially appropriate vehicle to resolve an issue of importance not only to *amicus*, but to numerous other tribes similarly situated.

1. The western portion of the Reservation shares a long border with the Custer Gallatin National Forest in Montana, where the Montana Supreme Court (in interpreting another tribe's treaty) held that tribes whose treaties provide for off-reservation hunting rights may exercise those rights on National Forest lands. *See generally Stasso*, 563 P.2d 562. The Confederated Salish and Kootenai Tribes ("CSKT") reserved for their members, *inter alia*, "the privilege of hunting . . . upon open and unclaimed land." *Id.* at 563-64 (quoting Treaty of Hell Gate). In *Stasso*, a CSKT member shot and killed a deer within National Forest lands outside the Flathead Reservation and was convicted of killing a deer out of season. *Id.* at 562-63. The *Stasso* court concluded that "the National Forest lands herein are open and unclaimed lands" available for off-reservation treaty hunting. *Id.* at 565. Presumably Montana, which is in the Ninth Circuit, would uphold under its own precedent and that of the Ninth Circuit the treaty-guaranteed right of the Crow Tribe's

members to hunt on the "unoccupied lands of the United States" that make up the Custer Gallatin National Forest.

2. The south-central portion of the Tribe's Reservation, however, borders the Bighorn National Forest in Wyoming, where the decision below and *Repsis* put the Tribe's members in criminal jeopardy if they exercise their hunting rights in that National Forest created from their ceded lands. Consequently, two members of the Tribe who follow game across the Reservation borders into different National Forests would find themselves governed by vastly different legal schemes purely as a matter of differing state understanding and enforcement of Federal law, including a split in authority between two different Federal circuits. One who follows prey into the Custer Gallatin National Forest may take game for sustenance; however, one who follows prey into the Bighorn National Forest is subject to arrest and prosecution for doing the same, despite the fact that both hunters share the same treaty rights, and both are hunting on Federal lands that share the same legal status as National Forests created from the Tribe's ceded lands.

3. Neither the text of the Tribe's treaties, nor of the statutes creating the National Forests, nor the decision below, suggests any reason to believe that Congress intended to rely on state law to determine the scope of off-reservation hunting rights on Federal lands. *Cf. Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44 (1989) ("the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term").

Only this Court can resolve this split; therefore, certiorari is necessary.

II. THE DECISION BELOW CONFLICTS WITH A LONG LINE OF THIS COURT'S DECISIONS ON TWO IMPORTANT QUESTIONS OF FEDERAL LAW: UNDER WHAT CONDITIONS ARE INDIAN TREATY RIGHTS ABROGATED, AND WHAT PRINCIPLES GOVERN THE INTERPRETATION OF INDIAN TREATIES.

This Court most recently considered the question of tribal treaty hunting rights in *Mille Lacs*. 526 U.S. 172 (1999). Unfortunately, the decision below ignores several of the key holdings of *Mille Lacs*, as well as a long line of other cases decided by this Court.

A. Congress has never expressed an intent to abrogate the Tribe's off-reservation treaty hunting rights; to the contrary, it has reaffirmed them in multiple statutes.

1. There is no question that the Tribe, in both the 1851 Treaty and the 1868 Treaty, reserved the inherent right of its members to hunt on lands outside the Reservation. 1851 Treaty, 11 Stat. 749 and 2 C. Kappler 594; 1868 Treaty, 15 Stat. 649; *see also United States v. Winans*, 198 U.S. 371 (1905) (affirming tribe's right, reserved by treaty, to fish off of its reservation). The right retained in the 1851 Treaty was sweeping: the Tribe (and other signatory tribes) "do not

surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 11 Stat. 749 and 2 C. Kappler at 595 art. 5 (1904); *Montana v. United States*, 450 U.S. 544, 548. The 1868 Treaty provides that the Tribe's members "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 15 Stat. at 650 art. IV.

2. Congress must clearly express its intent to abrogate a treaty right. *Mille Lacs*, 526 U.S. at 202; *see also United States v. Dion*, 476 U.S. 734, 738 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain."); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights."); *cf. Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968) ("While the power to abrogate [hunting and fishing] rights exists, the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress" (internal quotation and citations omitted).).[10] Moreover, "[t]here must be

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[10] Although each of the preceding cases concerned tribal hunting and fishing rights, this Court has applied this "clear intent" standard to any number of contexts, including reservation diminishment, *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2017) ("Only Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear" (internal quotation and citation omitted).); *Solem v. Bartlett*, 465 U.S. 463, 470

'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" *Mille Lacs*, 526 U.S. at 202-03 (quoting *Dion*, 476 U.S. at 740).[11]

3. The decision below fails to identify any statute containing the requisite "clear[] express[ion]" of Congress to abrogate the Tribe's off-reservation hunting right. It merely cites *Repsis* for the proposition that the Tribe's off-reservation hunting right "was repealed by the act of admitting Wyoming into the Union," App.22 (quoting *Repsis*, 73 F.3d at 992). *Repsis*, in turn, identified no provision of the act admitting Wyoming

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(1984) ("Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."); and tribal sovereign immunity, *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2031 (2014) ("'To abrogate [tribal] immunity, Congress must 'unequivocally' express that purpose'" (quoting *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting, in turn, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978))).)

[11] The cases cited are consistent with current international legal standards on indigenous peoples' rights, including treaty rights. *See, e.g.*, U.N. Decl. on the Rights of Indigenous Peoples, art. 26.3 (states are to recognize, respect, and protect indigenous rights to lands, territories, and resources traditionally owned, occupied, or otherwise used or acquired by indigenous peoples), art.46.2 (rights of indigenous peoples are not lightly to be limited). The United States has stated its support for these standards. *See* Announcement of United States Support for the United Nations Declaration on the Rights of Indigenous Peoples, http://www.achp.gov/docs/US%20Support%20for%20Declaration%2012-10.pd0.

in which Congress "clearly expressed its intent" to abrogate the Tribe's off-reservation hunting right, but instead relied only upon this Court's decision in *Race Horse*, 163 U.S. 504, that the equal footing doctrine created an "irreconcilable" conflict between a tribe's off-reservation hunting right and the "power of a State to control and regulate the taking of game." *Repsis*, 73 F.3d at 990 (quoting *Race Horse*, 163 U.S. at 507, 514). In *Mille Lacs*, this court expressly repudiated that aspect of *Race Horse* (and, necessarily, of *Repsis* as well):

> But *Race Horse* rested on a false premise. As this Court's subsequent cases have made clear, an Indian tribe's rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State. Rather, Indian treaty rights can coexist with state management of natural resources.

Mille Lacs, 526 U.S. at 204 (internal citations omitted), *see also Buchanan*, 978 P.2d at 1082-83 (noting the reliance of *Repsis* on *Race Horse*, and that "the United States Supreme Court effectively overruled *Race Horse* in [*Mille Lacs*]"). The decision below, notwithstanding this Court's intervening decision in *Mille Lacs*, held that Petitioner had no right to challenge the holding in *Repsis* "even if that determination was based on an erroneous application of the law." App.24.

In fact, Congress has never "clearly expresse[d] its intent" to abrogate the Tribe's off-reservation hunting right. The act admitting Wyoming to the Union did not do so. *See generally* An act to provide for the admission

of the State of Wyoming into the Union, and for other purposes, 26 Stat. 222 (1890).[12]

On the contrary, in the years following the admission of Wyoming to the Union, Congress expressly reaffirmed that the Tribe's treaties continued in full force and effect. Some eight months after Wyoming was admitted to the Union, in a negotiated agreement enacted as part of an Indian appropriations act, Congress expressly provided that "all existing provisions" of the 1868 Treaty "shall continue in force." 26 Stat. at 1042 (1891). That same day, Congress also enacted the Forest Reserve Act, which both authorized the Executive to create National Forests and expressly provided "[t]hat nothing in this act shall change, repeal or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes. . . ." An act to repeal timber culture laws, and for other purposes, 26 Stat. 1095, 1099 sec. 10 (1891).[13] Finally, another negotiated agreement enacted by Congress in 1904 provided that "existing provisions of all former treaties with the Crow tribe [sic] of Indians not inconsistent with the provisions of this agreement are hereby continued in force and effect."

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[12] Nor did President Cleveland's proclamation creating the Bighorn National Forest. *See generally* A Proclamation by the President of the United States of America, 29 Stat. 909 (1897). Moreover, as Petitioner demonstrates, the President could not have abrogated the Tribe's treaty rights unless expressly authorized to do so by Congress, which he was not. Pet.22-23.

[13] Section 10 contains an exception that is not relevant to this matter.

An act to ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect, 33 Stat. 352, 355 (1904).[14]

Certiorari is necessary to remedy the failure of the decision below to follow this Court's clear requirements for finding abrogation of a tribe's treaty-reserved right.

B. The decision below failed to interpret the 1868 Treaty as the Tribe would have understood it, as required by this Court.

1. A guiding principle of this Court's Indian law jurisprudence is that "we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Mille Lacs*, 526 U.S. at 196 (citing *Washington State Commercial Passenger*

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[14] Similarly, neither the decision below, nor the opinion in *Repsis* upon which the decision below relied, identifies any statute "clearly expressing [Congress's] intent" to remove the Big Horn National Forest from the category of "unoccupied lands of the United States." Although the *Repsis* court noted that "Congress created the Big Horn National Forest and expressly mandated that the national forest lands be managed and regulated for the specific purposes of improving and protecting the forest, securing favorable water flows, and furnishing a continuous supply of timber," 73 F.3d at 993 (citing 16 U.S.C. § 475), it identified no evidence that Congress considered the conflict between these purposes and the Tribe's exercise of its treaty rights and resolved the conflict by abrogating the treaty, as required by *Mille Lacs*. 526 U.S. at 202-03. As Petitioner demonstrates, the creation of the Big Horn National Forest did not, in fact, abrogate the Tribe's off-reservation hunting right on those lands. Pet.21-24.

Fishing Vessel Ass'n, 443 U.S. at 675-76; *Winans*, 198 U.S. at 380-81); *see also United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938) (treaties "are not to be interpreted narrowly, . . . but are to be construed in the sense in which naturally the Indians would understand them"); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-54 (1832) (interpreting treaty as the Cherokee would have understood its meaning).

2. Neither the decision below, nor the *Repsis* decision upon which it relies, contains any indication that the Tribe, when it entered the 1868 Treaty, understood that that treaty "clearly contemplated" the expiration of the off-reservation hunting right upon Wyoming's admission to the Union. The decision below merely (and erroneously) concludes that *Repsis* remains good law, notwithstanding this Court's intervening decision in *Mille Lacs*. App.24 ("*Mille Lacs* did not overturn *Race Horse* or *Repsis*. Rather, it affirmed the concept that a court interpreting a treaty must determine if the rights reserved in the treaty were intended to be perpetual or if they were intended to expire upon the happening of a 'clearly contemplated event'" (footnote omitted).); *id.* at 24 n.6 ("the *Mille Lacs* Court held that courts should look to see whether the rights granted in a treaty were intended to terminate upon the happening of a clearly contemplated event, as the *Race Horse* court had done.").

The *Repsis* court acknowledged its obligation to interpret the 1868 Treaty as the Tribe would have understood it. 73 F.3d at 992 (collecting cases). Nevertheless, *Repsis* concluded that Wyoming's statehood

constituted the "clearly contemplated event" that terminated the Tribe's treaty-guaranteed off-reservation hunting right, while pointing to no evidence whatsoever that the Tribe understood that its hunting right would terminate upon statehood (of Wyoming or any other state). *See generally id.* In the alternative, the *Repsis* court concluded that the creation of the Bighorn National Forest rendered the lands contained therein no longer "unoccupied" and, therefore, extinguished the Tribe's treaty-guaranteed off-reservation hunting right on those lands. *Id.* at 986.

3. The historical record demonstrates, instead, that both the Tribe *and* the United States understood that the Tribe's members would be allowed to hunt on ceded lands so long as there was game to hunt and doing so would not interfere with non-Indian settlement. In welcoming the Tribe to the negotiations, Commissioner Taylor told the Tribe's representatives that the United States hoped to settle most of the Tribe's territory, but that the Tribe nonetheless would retain "the right to hunt upon it as long as the game lasts." *Proceedings* at 86. In response, all three of the Tribe's representatives emphasized the importance of hunting to the Tribe's way of life. *Id.* at 88-89. The following day, Commissioner Taylor reassured the Tribe's representatives that even upon accepting a reservation, "[y]ou will still be free to hunt as you are now." *Id.* at 90. Thus, both the Tribe and the United States understood that the Tribe, even if it accepted a reservation, intended to preserve its right to hunt throughout its territory.

Ultimately, the 1868 Treaty provided that the Tribe's members could continue to hunt "on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, 15 Stat. at 650 art. IV. The natural reading of this provision is that the Tribe's members could continue to hunt away from the Reservation "as long as these trips did not interfere with non-Indian settlement." Hoxie, *The Crow* at 72. That also was the United States' contemporaneous understanding, as demonstrated by Sen. James Harlan's explanation on the floor of the Senate:

> There is, I think, in the same treaty, a provision permitting these Indians to hunt, so long as they can do so without interfering with the settlements. So long as outside lands, outside of the reservation, may not be occupied by settlements, and may be occupied by game, they may hunt the game.

Cong. Globe, 40th Cong., 3d Sess. 1348, col. 3 (Feb. 18, 1869); *see also State v. Cutler*, 708 P.2d 853, 863 (Idaho 1985) (quoting Sen. Harlan).

4. The 1868 Treaty provides that the Tribe's off-reservation hunting right persists so long as three conditions are met: (1) the United States retains unoccupied lands; (2) game may be found on those lands; and (3) there is peace between the United States and the Tribe. 1868 Treaty, 15 Stat. at 650 art. IV.

Each of those conditions continues to this day. (1) The United States maintains unoccupied lands, including the Bighorn National Forest, *see* Pet. 21-24, within the territory ceded by the Tribe. (2) Game is found on those lands – as demonstrated by the fact that Petitioner took three elk on those lands. Respondent's own Game & Fish Department reports that elk are abundant in the region.[15] Finally, there has been peace between the United States and the Tribe since the 1868 Treaty was executed.[16]

5. The decision below made no examination of these express conditions in the 1868 Treaty which continue to this day, and instead – contrary to this Court's direction in cases dating back almost 200 years – concluded without any evidence that the treaty "clearly contemplated" that the Tribe's treaty-guaranteed

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[15] Wyoming Game & Fish Dep't, Wyoming Statewide Hunting Season Forecast (rev. Sept. 12, 2017), *available at* https://wgfd.wyo.gov/Hunting/Wyoming-Hunting-Forecast (last visited Oct. 27, 2017) (elk populations in Sheridan Region, which encompasses Bighorn National Forest, "exceed[] management objectives").

[16] The Tribe allied with the United States against the Sioux, Cheyenne, and Arapaho in the 1870s. As the Crow Chief Plenty-Coups explained, the Tribe provided scouts for the United States at the Little Bighorn for the purpose of preserving peace with the United States and preserving their territorial rights: "Our decision was reached, not because we loved the white man who was already crowding other tribes into our country, or because we hated the Sioux, Cheyenne, and Arapahoe, but because we plainly saw that this course was the only one which might save our beautiful country for us." Frank B. Linderman, *Plenty-Coups: Chief of the Crows* 85 (new ed. 2002); *see also* Peter Nabokov, *Two Leggings: The Making of a Crow Warrior* 187 (1967) ("We helped the white man so we could own our land in peace.").

off-reservation hunting right would terminate. Certiorari is warranted, and necessary, to remedy these failures.

CONCLUSION

For the forgoing reasons, Your *Amicus* respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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RECORD AND 1 BRIEFS

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No. 17-532

In the

Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Petition for Writ of Certiorari to the District Court of Wyoming, Sheridan County

BRIEF OF INDIAN LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici, listed in the APPENDIX, are professors and scholars of Indian law. Amici are interested in the proper application of this Court's precedents relevant to Indian treaties and the Supremacy Clause of the United States Constitution. Amici believe that controlling decisions of this Court require application of specific legal rules developed in the area of federal Indian law for interpreting Indian treaties.

SUMMARY OF THE ARGUMENT

Petitioner asks this Court to resolve fundamental questions about the scope of the off-reservation hunting rights reserved by the Crow Tribe of Indians, whose reservation in Montana borders Wyoming, in the Tribe's 1868 Treaty with the United States. The Treaty guaranteed to Petitioner and all other members of the Crow Tribe the "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Treaty with the Crows, art. 4, May 7, 1868, 15 Stat. 649.

The status of Indian treaties as the "supreme Law of the Land," their foundational role in our

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* file this brief as individuals and not on behalf of the institutions with which they are affiliated. All parties received 10 days' notice before its due date of amici's intent to file this brief, and all parties have consented to its filing.

constitutional system, and two centuries of this Court's development and application of standards for reviewing and interpreting Indian treaties demand careful scrutiny before any state may infringe upon treaty rights. U.S. Const. art. VI, cl. 2. In addition, treaty-reserved rights to hunt, fish, and gather in ceded aboriginal territories remain central to the existence and identity of Indian tribes and their people. Certiorari is warranted to ensure that treaty-reserved rights retain their proper recognition within our constitutional system and are protected by this Court's jurisprudence.

ARGUMENT

I. Indian Treaties Establish the Foundations of Federal Indian Law.

Treaties made by and between the United States and Indian tribes form the foundation of the unique federal-tribal relationship and have helped define that relationship since this Court's earliest decisions. Although the Supremacy Clause, U.S. Const. art. VI, cl. 2, establishes the primacy of treaties as a legal matter, it was not until this Court began interpreting and applying that clause in the context of treaties between the United States and the Cherokee Nation that the import of Indian treaties became clear.

In *Cherokee Nation v. Georgia*, Chief Justice Marshall relied upon those treaties to support his designation of Indian tribes as both "nations," 30 U.S. 1, 16 (1831) ("The numerous treaties made with them by the United States recognize them as a people . . . responsible in their political character for any violation of their engagements."), and "dependent," *id.* at 17 ("They acknowledge

themselves in their treaties to be under the protection of the United States."). The characterization of Indian tribes as "domestic dependent nations," *id.* at 17, defines this Court's understanding of tribal status to the present day. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (citations omitted) ("Indian tribes are 'domestic dependent nations.'").

This Court's reliance on and interpretation of the Cherokee treaties also helped define the relationship between tribes and the federal government, and the authority of individual states. In the term following *Cherokee Nation*, the Court determined that "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union." *Worcester v. Georgia*, 31 U.S. 515, 557 (1832). Because the acts of the State of Georgia "interfere[d] forcibly with the relations established between the United States and the Cherokee nation" and were "in direct hostility with [those] treaties," the Court determined the state laws could "have no force" within Cherokee territory. *Id.* at 561. This Court continues to acknowledge tribes as separate and independent from states in its development of federal Indian law. *See, e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) ("For nearly two centuries now, we have recognized Indian tribes as 'distinct, independent political communities.'" (quoting *Worcester*, 31 U.S. at 559)). It remains well established that treaties are a significant component in defining the federal relationship with Indian tribes

and insulate inherent Indian rights from state intrusion.

II. The Indian Canons of Construction Protect These Foundations.

The Court has long recognized that because the terms and provisions of Indian treaties involve the reservation of lands, waters, and hunting and fishing rights on which Indian life depends, specific rules of treaty construction control their interpretation. *See, e.g., Worcester*, 31 U.S. at 551-57 (interpreting the Treaty of Hopewell in view of congressional policy to "treat [tribes] as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate"). These fundamental maxims of interpretation, known as the Indian canons of construction, are "rooted in the unique trust relationship between the United States and the Indians." *Oneida Cty. v. Oneida Indian Nation*, 470 U.S. 226, 257 (1985). The Indian canons are "enlarged rules of construction," *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866), which ensure that "the language used in treaties with the Indians should never be construed to their prejudice." *Worcester*, 31 U.S. at 582.

There are three basic Indian canons employed by the Court. First, treaty language must be construed as the Indians would have understood it, and the rights reserved by treaties remain intact unless *Congress* has expressed clear and unambiguous contrary intent. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (*Mille Lacs*); *Jones v. Meehan*, 175 U.S. 1, 10-12 (1866); *United States v. Shoshone Tribe*, 304 U.S.

111, 116 (1938). Second, Indian treaties must be construed liberally in favor of the Indians. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible . . . in a spirit which generously recognizes the full obligation of this nation to protect the [Indian] interests."); *Antoine v. Washington*, 420 U.S. 194, 199 (1975) ("The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." (citing *Worcester*, 31 U.S. 515)); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) (*Fishing Vessel*). Finally, ambiguities in the treaty language must be resolved in favor of the Indians. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174 (1973).

These interpretive rules reflect the Court's understanding that a "treaty was not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). The canons do not simply address a perceived inequality in bargaining power between tribes and the United States, but reflect accepted interpretive principles; thus they "do not turn on the ebb and flow of judicial solicitude for powerless minorities." *Cohen's Handbook of Federal Indian Law* § 2.02[2], at 118 (Nell Jessup Newton, ed., 2012). Indeed, the canons "have quasi-constitutional status; they provide an interpretive methodology for protecting fundamental constitutive, structural values against all but explicit congressional derogation." *Id.* at 118-19.

III. The Court Has Applied the Indian Canons of Construction to Limit State Authority Over Indians Exercising Reserved Treaty Rights to Hunt and Fish Off-Reservation

The exercise by an individual Indian of rights reserved in a treaty can lead to conflict with state authority, particularly where the Indian seeks to exercise a reserved right to hunt or fish away from the tribal member's reservation. With the exception of its decision in *Ward v. Race Horse*, 163 U.S. 504 (1896), the Court has resolved these conflicts by applying the Indian canons of construction to insulate tribal treaty rights from state regulation except in narrow and specific circumstances.

In 1905, the Court began a long tradition of resolving conflicts related to the off-reservation exercise of rights by Indians in the Northwest by employing the canons of construction. It carefully considered the context in which the treaty was negotiated and construed treaty language as the Indians would have understood it. *Winans*, 198 U.S. at 380-81. The Court recognized that the right to use traditional fishing locations was "part of larger rights possessed by the Indians," and that the "form of the [treaty] and its language was adapted" to preserve the exercise of those rights. *Id.* at 381. Despite the treaty language securing Indian rights "*in common* with the citizens" of the territory, the Court concluded that the treaty "seemed to promise . . . and give the word of the nation for more" than just allowing Indians to exercise the same rights as other citizens of the state, rights they would have had in the absence of the treaty. *Id.* at 379-80. The Court

also rejected the argument that the reserved rights were abrogated by admission of the State of Washington to the Union. *Id.* at 382-84.

The Indian canons of construction continued to play a central role in the Court's resolution of subsequent cases involving similar conflicts between the exercise of off-reservation treaty rights and the authority of the State of Washington. In *Tulee*, the Court considered Washington's conviction of a member of the Yakima tribe for failure to obtain a state license to fish. 315 U.S. at 682. "Viewing the treaty in [ ] light" of the canons requiring liberal construction and an understanding of the language as the Indians would have understood it, the Court determined that the "state is without power to charge the Yakimas a fee for fishing" because the state's licensing requirement could not "be reconciled with a fair construction of the treaty." *Id.* at 685.

In a series of cases following *Winans* and *Tulee*, the Court defined the balance between off-reservation treaty rights and state authority to regulate the exercise of those rights. The Court ruled that state regulatory authority is limited to that necessary for the conservation of a species, and it may not discriminate against Indians exercising treaty rights. *See Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392 (1968) (*Puyallup I*); *Department of Game of Wash. v. Puyallup Tribe*, 414 U.S 44 (1973); *Antoine*, 420 U.S. 194; *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977); *Fishing Vessel*, 443 U.S. at 675-76. In these cases, the Court analyzed the relevant treaty or other agreement in accordance with the canons of

construction. *E.g.*, *Puyallup I*, 391 U.S. at 397-98 ("It is in th[e] spirit [of liberal treaty construction] that we approach these cases."); *Antoine*, 420 U.S. at 199-200; *Fishing Vessel*, 443 U.S. at 675-76.

Most recently, the Court reiterated the importance of the Indian canons of construction in *Mille Lacs*. There, the Court relied upon the canons to preserve a tribe's off-reservation rights to hunt, fish, and gather secured in an 1837 treaty despite a subsequent Executive Order purporting to revoke those rights, cessions by the tribe in a subsequent treaty, and the Act of Congress admitting Minnesota to the Union. 526 U.S. at 175-76. Central to the Court's treaty interpretation was the requirement that courts "look beyond the written words to the larger context that frames the Treaty," which "sheds light on how the [Indian] signatories to the Treaty understood the agreement." *Id.* at 196. This contextual understanding must come from "an analysis of the history, purpose, and negotiations of *this Treaty*," and may not be drawn from analogies to or reliance upon judicial interpretation of other agreements with similar language. *Id.* at 202. An argument that "similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of the basic principles of treaty construction." *Id.*

The *Mille Lacs* Court also confirmed the strict limits on state regulation of the exercise of off-reservation treaty rights, stating: "[w]e have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing and gathering

rights in the interest of conservation." *Id.* at 205 (citing *Puyallup I*, 391 U.S. at 398; *Fishing Vessel*, 443 U.S. at 682; *Antoine*, 420 U.S. at 207-08). The Court confirmed that state authority over Indians exercising treaty rights is available only as a last resort because, absent established conservation-necessity, Indian treaty-hunters have "the right to hunt . . . free [from] state regulation, a privilege that others [do] not enjoy." *Id.* at 204; *see also Antoine*, 420 U.S. at 207 (to regulate treaty-hunting, a state "must demonstrate that its regulation is a reasonable and necessary conservation measure *and* that its application to the Indians is necessary" (citations omitted)); *United States v. Washington*, 520 F.2d 676, 686 & n.3 (9th Cir. 1975) (unless a state has demonstrated that conservation necessity requires "*application to the Indians*" of a state hunting or fishing regulation,"[t]he state must pursue its goals as best it can by regulating its own non-treaty . . . citizens" (emphasis added)).[2]

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[2] Here, the lower court did not reach the issue of conservation necessity, Order of Apr. 27, 2017, at 13 n.7; however, ample publicly available evidence demonstrates the lack of any need to regulate Indian treaty hunters to conserve the elk population in Wyoming. *See, e.g.*, *2015 Annual Report* A-3, Wyoming Game and Fish Dep't, https://wgfd.wyo.gov/WGFD/media/content/PDF/AboutUs/Commission/WGFD_ANNUALREPORT_2015.pdf (last visited Nov. 9, 2017) ("Overall, the Department continues management strategies to reduce Wyoming elk numbers."); *Elk Hunting*, Wyoming Game & Fish Dep't, https://wgfd.wyo.gov/Hunting/Hunt-Planner/Elk-Hunting (last visited Nov. 6, 2017) (limiting an applicant to no more than three elk licenses in any one calendar year); *2016 Hunting Forecast – Game and Fish*, Wyoming Wildlife Fed'n (Aug. 5, 2016), http://wyomingwildlife.org/2016-hunting-forecast-game-and-

The Indian canons of construction are essential aspects of this Court's Indian law jurisprudence and necessary for ensuring that treaties and the rights reserved therein are given due consideration and protection. As yet, no court has interpreted the Crow Treaty in accordance with this Court's guidance in *Mille Lacs*, and certiorari is warranted to ensure that the Indian canons of construction are properly considered and applied in this matter.

IV. The Indian Canons of Construction Also Serve to Protect Important Aspects of Tribal Identity.

Treaty-reserved rights to hunt and fish, like those asserted by Petitioner, are fundamental aspects of tribal culture, society, and daily life, just as they have been since before the treaties were entered. As Judge Boldt noted in his landmark 1974 decision regarding tribal fishing rights in the State of Washington, those rights protect "the means of economic livelihood and the foundation of native culture," and "[r]eservation of the right to gather food in this fashion protected the Indians' right to maintain essential elements of their way of life, as a complement to the life defined by the permanent homes, allotted farm lands, compulsory education, technical assistance and pecuniary rewards offered in the treaties." *United States v. Washington*, 384 F. Supp. 312, 406-07 (W.D. Wash. 1974). Judge Boldt's findings followed this Court's reasoning more than a

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fish/ ("All elk herds surrounding the Bighorn Basin, with the exception of the Crandall/Sunlight herd, are above [the population] objective. That includes the northern Bighorn Mountains . . .").

century ago that these activities and their protection were "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Winans*, 198 U.S. at 381-82. Off-reservation usufructuary rights remain essential to the very identity of the tribes and tribal people who exercise them today. *See, e.g.*, *We Are All Salmon People*, Columbia River Intertribal Fish Comm'n, http://www.critfc.org/salmon-culture/we-are-all-salmon-people/ (last visited Oct. 25, 2017); Allison M. Dussias, *Spirit Food and Sovereignty: Pathways for Protecting Indigenous Peoples' Subsistence Rights*, 58 Clev. St. L. Rev. 273, 276 (2010) (subsistence resources "are not just food for the body, but also 'spirit food'").

For the Crow Tribe, retaining off-reservation rights was a matter of survival. Descriptions of Crow lands circa 1830 and shortly after the 1868 Treaty was signed reveal a self-sufficient people living in a country containing bountiful resources, which amply satisfied Crow people and impressed non-Indian visitors. *See, e.g.*, Angie Debo, *A History of the Indians of the United States* (1970), at 284-85.[3] As

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[3] Debo relied upon Hugh Lenox Scott's description of a Crow village in 1877 in which he "found the Crows 'rich in everything an Indian required to make him happy.'" Debo, *supra* at 284. Several decades earlier, Crow Chief Arapooish (or Sore Belly) had expressed complete contentment with his home:

> The Crow country is a good country. The Great Spirit has put it in exactly the right place. . . . There you can hunt the elk, the deer, and the antelope, when their skins are fit for dressing; there you will find plenty of white bears and mountain sheep. . . . [T]here you will find buffalo meat for yourselves . . . Everything good is

the majority of this Court noted in *Montana v. United States*, "at the time of the [1868] treaty, the Crows were a nomadic tribe dependent chiefly on buffalo." 450 U.S. 544, 556 (1981). Non-Indian settlement, however, diminished game populations, significantly impacting the Crow way of life. By 1868 there was "clear recognition by the United States that the traditional mainstay of the Crow Indians' diet was disappearing." *Id.* at 572 (Blackmun, J., dissenting). To compensate for the loss of natural resources found on lands the Crow ceded to the United States, the Tribe expressly retained in Article 4 the "right to hunt on the unoccupied lands of the United States," thus preserving their ability to access game and maintain their existence. Treaty with the Crows, art. 4, 15 Stat. at 650.[4]

The exercise of these rights remains central to tribes and their members. Petitioner went hunting in January 2014 to put elk meat on the table for his

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to be found there. There is no country like the Crow country.

Joseph Medicine Crow, *From the Heart of the Crow Country: The Crow Indians' Own Stories* xxi-xxii (1992); *see also East of Yellowstone Lies the Absarokas-Crow Country*, The Human Footprint (Mar. 2, 2011), http://thehumanfootprint.wordpress.com/2011/03/02/east-of-yellowstone-lies-the-absarokas-crow-country; Alden Big Man Jr., *Crow History 1700-1950: A Political and Social Battle to Retain Their Culture*, Univ. of N.M. Digital Repository, July 2, 2011, http://digitalrepository.unm.edu/hist_etds/7.

[4] As Petitioner notes, many other tribes across the American West and in the Great Lakes region reserved usufructuary rights in their treaties to ensure the continuation of their lifeways. Pet. Brief at 28-29.

family and members of his community, as the Crow have done since time immemorial. Pet. Brief at 29. Though Petitioner's hunt began in Montana, his pursuit of elk took him into Wyoming; however, many tribal members often travel outside of their reservations and sometimes across state lines to exercise treaty rights within their aboriginal territories for subsistence hunting purposes. *See, e.g.*, *Tribal Hunting & Co-Management*, Wash. Dep't of Fish & Wildlife, http://wdfw.wa.gov/hunting/tribal/treaty_history.html (last visited Oct. 25, 2017) (24 tribes have off-reservation hunting rights in the State of Washington, including two tribes located outside of the state). In Montana, a number of tribes from across the region, including the Shoshone-Bannock Tribes whose treaty rights in Wyoming were the subject of *Race Horse*, 163 U.S. at 507; *see* Treaty with the Eastern Band Shoshoni and Bannock, July 3, 1868, 15 Stat. 673, continue to hunt wild bison on unoccupied lands near Yellowstone National Park. *See FAQ on Tribal Treaty Hunting Rights and Bison*, State of Mont. Dep't of Fish, Wildlife & Parks, http://fwp.mt.gov/fwpDoc.html?id=75713 (last visited Oct. 25, 2017) (listing the Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Salish and Kootenai Tribes, Montana; Nez Perce and Shoshone-Bannock Tribes, Idaho; and Confederated Tribes of the Yakama Nation, Washington, as having "demonstrated treaty rights to hunt bison in Montana and . . . now hunting bison in Montana.") In 2016, consistent with the terms of their treaties and the mutually agreed-upon terms of harvest established through the Inter-Agency Bison

Management Plan, these tribal hunters harvested more than 350 bison from unoccupied lands just across the Wyoming-Montana border to the north and west of Yellowstone National Park. *2016 Annual Report of the Interagency Bison Management Plan*, Interagency Bison Management Plan, *available at* http://www.ibmp.info/Library/AnnualReports/ 2016_ IBMP_AnnualReport_FINAL.pdf (last visited Oct. 25, 2017).

Reserved "[h]unting and fishing rights are significant in a public health context because many tribal communities rely upon these traditional foods for subsistence." Akshara Menon & Matthew Penn, *American Indian and Alaska Native Hunting and Fishing Rights*, Centers for Disease Control and Prevention, Office for State, Tribal Local and Territorial Support, https://www.cdc.gov/phlp/docs/ tribalhunting-brief.pdf (last visited Nov. 6, 2017). Had the Crow and other tribes not reserved these rights in their treaties and had the rights not been protected by the decisions of this and other courts, tribal members would have lost important property rights that contribute to cultural preservation and help sustain healthier tribal communities. Any infringement on a tribe's ability to exercise retained treaty rights harms their unique connections to their traditions and the natural world, connections that, although different for each tribe, are integral to tribal existence itself. *See, e.g.*, Letter from Chairman Joe Durglo, Confederated Salish and Kootenai Tribes, to Mont. State House of Representatives, House Agric. Comm. (April 11, 2013), http://leg.mt.gov/bills/2013/Minutes/House/ Exhibits/ agh76a02.pdf ("The buffalo remains a key component

of our culture today, and preserves a connection to tribal traditions that date back uncounted generations . . . . [T]he Tribes reserved the right to hunt and fish [in the 1855 Treaty of Hellgate] . . . [and o]ur tribal members have a long history of hunting the buffalo . . . [;] we continue to rely on their meat, hides, and other parts to sustain us physically and spiritually.").

The continuing "physical[ ] and spiritual[ ]" sustenance ensured by treaty rights demands more protection than the vicissitudes of varying state legislative and regulatory priorities. *Id.* Diverging from the majority position that national forest lands are "unoccupied" or "open and unclaimed" lands, *see* Pet. Brief at 24-25, the decisions below render tribal citizens, including Petitioner, other members of the Crow Tribe, and members of the Shoshone-Bannock Tribes, subject to all state laws when hunting in Wyoming even though they are free from state regulation when exercising the same rights in the national forest lands of neighboring states. According to this Court's Indian canons precedent, treaty rights require uniform application and must not depend on state boundaries, absent congressional action expressly requiring such limitation or demonstrated conservation necessity. *Mille Lacs*, 526 U.S. at 205. The absurd result of the decisions below demonstrates the consequences of impliedly abrogating treaty rights in contravention of this Court's guidance concerning treaty interpretation. *See id.* at 202; *compare id.* at 205 ("[S]tatehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries."), *with Race Horse*, 163 U.S. at 514

("[R]epeal [of the treaty-reserved rights] results from the conflict between the treaty and the act admitting [Wyoming] into the Union," even though the latter act was silent as to treaty rights.). Like the elk that Petitioner pursued from Montana into Wyoming, the rights reserved by Indian tribes in treaties with the federal government are not limited by state boundaries. Certiorari is required to abate this unlawful outcome and ensure that the Crow Treaty is duly interpreted according to the Indian canons of construction. *See Mille Lacs*, 526 U.S. at 196-203.

CONCLUSION

For nearly 200 years, this Court's interpretation of the solemn guarantees made in Indian treaties acknowledged the rightful supremacy of those promises in our constitutional framework. This Court has faithfully and repeatedly protected the tribal rights reserved in those treaties from unjustified abrogation and improper subjugation to state authority. Such protection is mandated not only by the supremacy of federal treaties under the Constitution but by justice itself. *See, e.g., Winans*, 198 U.S. at 380-81 (applying the canons of construction to "counterpoise the inequality" of treaty negotiations and observing that the "negotiations and a convention . . . seemed to promise more, and give the word of the nation for more" than the mere "rights . . . that any inhabitant of the territory or state would have"); *cf. Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word.").

The decision below is inconsistent with the well-established Indian canons of construction, with the Court's standards for abrogating a treaty right, and ultimately with the United States Constitution. Ignoring a century of Supreme Court decisions, Wyoming instead followed the single set of faded hoof prints left in 1896 by *Race Horse*. Although the courts below also found support from the Tenth Circuit's decision in *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), which took a similar route, this Court's *Mille Lacs* decision in 1999 plainly put both *Race Horse* and *Repsis* out to pasture. Wyoming's failure to follow this Court's most recent precedent on the matter has denigrated the Crow Tribe's federal treaty rights and resulted in an unjust criminal conviction. Certiorari is necessary to correct these errors and to protect the unabrogated rights retained by the Crow Tribe in the Treaty of 1868.

Respectfully submitted,

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List of Amici Curiae App-1

APPENDIX A

This Appendix provides *amici's* titles and institutional affiliations for identification purposes only.

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RECORD
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No. 17-532

In the
Supreme Court of the United States

CLAYVIN HERRERA,

PETITIONER,

v.

WYOMING,

RESPONDENT.

On Petition for a Writ of Certiorari to the District Court of Wyoming, Sheridan County

BRIEF FOR TIMOTHY P. MCCLEARY, JANINE PEASE, ELIZABETH SWANK, AND ESTHER WYNNE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE*

Amici curiae have devoted their careers to studying, educating, and treating the Crow Tribe of Indians. Because the decision below imperils public health by trampling the Tribe's treaty-protected right to hunt, amici file this brief in support of petitioner. The signatories to the brief, with affiliations provided for identification purposes only, are as follows:

Timothy P. McCleary, Ph.D., is an anthropology professor at Little Big Horn College in Crow Agency, Montana. He speaks and reads the Crow language, and has spent much of his career researching, teaching, and writing about the origins, history, and contemporary beliefs and practices of the Crow people.

Janine Pease, D.Ed., is the founding president of Little Big Horn College, a recipient of the MacArthur "genius grant," and a former trustee of the Smithsonian's National Museum of the American Indian. She now teaches Crow Studies and other disciplines at Little Big Horn College. A member of the Crow Tribe, she is the great-granddaughter of White Man Runs Him, one of the Crow scouts who served with Lieutenant Colonel George Armstrong Custer at the Battle of the Little Bighorn.

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* Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received timely notice of amici's intent to file this brief, and consented to it. Petitioner's and respondent's letters giving blanket consent to amicus briefs are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to this brief's preparation or submission.

Elizabeth Swank serves as the Public Health Emergency Preparedness Coordinator for the Public Health Department of Big Horn County, Montana, much of which is covered by the Crow reservation. As the spouse of a Crow hunter, she has firsthand knowledge of the dietary importance of keeping a freezer stocked with fresh elk meat throughout the long Montana winters.

Esther Wynne, R.N., B.S.N., P.H.N., serves as the Public Health Nurse for the Public Health Department of Big Horn County, Montana. After a quarter-century in that role, she has in-depth experience and understanding regarding the cultural and nutritional aspects of subsistence hunting, the importance of elk meat in the Crow way of life, the persistence of hunger on the Crow reservation, and the prevalence of obesity and type 2 diabetes among native peoples who eat a grain-based diet instead of their traditional game-based diet.

SUMMARY OF ARGUMENT

The Apsaalooke people, known in English as the Crow Tribe of Indians, have "always valued hunting and gathering in Crow Country as an activity of the highest cultural importance and the means for survival." Crow Tribal Legislature, Joint Action Resolution No. 13-09 (May 7, 2013), *available at* https://goo.gl/sbo1Gj. The Tribe's right to hunt is so important that it has merited explicit protection in two different treaties with the United States. In this case, the Court is asked to interpret one of those treaties and to decide "whether the Tribe's members can engage in subsistence hunting foundational to their identity and well-being." Pet. 28.

Amici respectfully submit that this important question of treaty interpretation should not be left to an intermediate state court. If allowed to stand, the decision below could harm the many members of the Crow Tribe who still rely on traditional subsistence hunting to feed their families during the winter. To avoid these public-health consequences, this Court should grant the petition, enforce the treaty, and restore the Crow Tribe's usufructuary rights.

ARGUMENT

A. The Crow Tribe Has Protected The Right To Hunt In Its Treaties With The United States.

This case is about the last in a series of treaties between the Crow Tribe and the United States, called the Second Treaty of Fort Laramie. In that 1868 document, the Tribe agreed to give up a significant amount of territory but took care to preserve its right to continue hunting, which remains vitally important to the Crow way of life.

1. The Crow Tribe migrated some three centuries ago to what is now southern Montana and northern Wyoming. *See Montana v. United States*, 450 U.S. 544, 547 (1981). In 1825, "[t]he United States agree[d] to receive the Crow tribe of Indians into their friendship [and] protection." Treaty with the Crow Tribe, U.S.-Crow, art. 2, Aug. 4, 1825, 7 Stat. 266, 1825 WL 3194. The United States undertook to regulate trade with the Tribe, *see id.* arts. 3–4, and to punish private violence against its members, *see id.* art. 5. In return, the Tribe gave an acknowledgment of United States supremacy, *see id.* art. 1, a promise not to supply weapons to enemies of

the United States, *see id.* art. 6, and a commitment to protect traders and others "authorized by the United States to pass through their country," *see id.* art. 4, among other things. This first treaty did not purport to define "the limits of [the Tribe's] district of country," *id.*, or otherwise constrain tribal hunting. *Cf. United States v. Winans*, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.").

In 1851, "warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie." *Montana*, 450 U.S. at 547. The signatory tribes agreed "to make an effective and lasting peace" among themselves, to give safe passage to settlers heading for California, and to "acknowledge [designated] tracts of country . . . as their respective territories." *See* Treaty of Fort Laramie, arts. 1, 4, 5, Sept. 17, 1851, 11 Stat. 749, 1851 WL 7655, *reprinted in* 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 594–96 (1904); *see also id.* arts. 2, 3, 7, 8 (assigning rights and obligations to the United States). In a sign of what really mattered, the Crow Tribe took care not to "surrender the privilege of hunting, fishing, or passing over" the territory that was designated for the other tribes. *See id.* art. 5. The designated Crow territory, confined to roughly 38.5 million acres in present-day Montana and Wyoming, was likewise subject to the usufructuary rights of the other tribes. *See id.*; *Montana*, 450 U.S. at 548; *United States v. Finch*, 395 F. Supp. 205, 215 (D. Mont. 1975) (mapping Crow territory circa 1851).

By 1867, continuing bloodshed in the West prompted the United States to create the Great Peace Commission, which went on to secure nine separate peace treaties with various tribes. *See* Note, *A Bad Man Is Hard to Find*, 127 HARV. L. REV. 2521, 2522–27 (2014) (recounting the history surrounding An Act to Establish Peace with Certain Hostile Indian Tribes, 15 Stat. 17 (July 20, 1867)). The Crow Tribe entered into one of those peace treaties in 1868, known as the Second Treaty of Fort Laramie. *See* Treaty with the Crow Tribe, U.S.-Crow, art. I, May 7, 1868, 15 Stat. 649, 1868 WL 24283. That document established a reservation on roughly 8 million acres in present-day Montana that would be "set apart for the absolute and undisturbed use and occupation of" the Crow Tribe, and on which the United States was to build a school and other buildings. *See id.* arts. II, III. The other 30 million or so acres of Crow territory were ceded to the United States. *See id.* art. II; *Montana*, 450 U.S. at 548; *United States v. N. Pac. Ry. Co.*, 311 U.S. 317, 354 (1940); *Finch*, 395 F. Supp. at 216 (mapping the Crow reservation circa 1868). A portion of the ceded lands would later become the Bighorn National Forest. *See* Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897).

Crucially, for purposes of this case, the Second Treaty of Fort Laramie again "addressed hunting rights specifically," with respect to the "lands outside the reservation boundaries." *Montana*, 450 U.S. at 559 n.7. The Crow Tribe agreed to make a permanent home on the much smaller reservation, but carefully reserved "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace

subsists among the whites and Indians on the borders of the hunting districts." Treaty with the Crow Tribe, U.S.-Crow, art. IV, May 7, 1868, 15 Stat. 649, 1868 WL 24283. The United States was willing to buy peace at that price in the wake of the Civil War. To be sure, incentives for farming were also put in place. *See id.* art. VI (giving acreage to "Indians [who] shall desire to commence farming"); *id.* art. IX (appropriating "ten dollars . . . annually . . . for each Indian roaming, and twenty dollars for each Indian engaged in agriculture"). But as Chief Blackfoot told the Great Peace Commission, the Crow Tribe would go on hunting:

> There is plenty of buffalo, deer, elk, and antelope in my country. There is plenty of beaver in all the streams. There is plenty of fish too. I never yet heard of any of the Crow Nation dying of starvation. I know that the game is fast decreasing, and whenever it gets scarce, I will tell my Great Father. That will be time enough to go farming.

Montana, 450 U.S. at 573 n.7 (Blackmun, J., dissenting) (emphasis omitted) (quoting INST. FOR THE DEV. OF INDIAN LAW, PROCEEDINGS OF THE GREAT PEACE COMMISSION OF 1867–1868, at 91 (1975)).

The Crow Tribe thus guarded its preexisting usufructuary rights in the treaties that shrank its territory down to 38.5 million acres, and then down to 8 million acres. Given the central importance of hunting on the ceded lands to the Crow way of life, it is hardly surprising that the right to hunt was expressly protected in both the First and Second

Treaties of Fort Laramie. As Justice Brown wrote of the Bannock Tribe:

> The right to hunt was not one secured to [the Indians] for sporting purposes, but as a means of subsistence. . . . [T]heir chief reliance for food has been upon the chase. The right to hunt on the unoccupied lands of the United States was a matter of supreme importance to them, and as a result of being deprived of it they can hardly escape becoming a burden on the public.

Ward v. Race Horse, 163 U.S. 504, 518 (1896) (Brown, J., dissenting). In fact, members of the Crow Tribe were so determined to retain their treaty right that they later agreed to serve as scouts for the United States Army in the Plains Indian Wars, including at the Battle of the Little Bighorn. After doing so much to protect the right to hunt, they have continued off-reservation hunting on the ceded lands, particularly in the Bighorn Mountains.

2. If the Crow Tribe is now to be stripped of these usufructuary rights, which the United States recognized in the Second Treaty of Fort Laramie and the Crow fought alongside Custer to preserve, such a decree ought to come from the Supreme Court of the United States, not an intermediate state court. After all, "[a] treaty . . . between the United States and an Indian tribe[ ] is essentially a contract between two sovereign nations." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). At the very least, this Court should call for the views of the Solicitor General. *See* Matthew L.M. Fletcher, *Factbound and Splitless: The*

Certiorari Process as Barrier to Justice for Indian Tribes, 51 ARIZ. L. REV. 933, 940 n.29 (2009) ("In Indian law cases, a CVSG is a common cert pool recommendation because of the special experience—and the special relationship—that the federal government has with Indians and Indian tribes."). As Solicitor General Henry M. Hoyt once explained, "[t]he Government has always striven against disparity between our promises when obtaining treaties and the actual meaning of the instrument as it is sought to be construed when the greed of white settlers is aroused." *Winans*, 198 U.S. at 372.

Contrary to the decision below, and as petitioner ably explains, no justification for clawing back this treaty right can be found in *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995). In that case, the Tenth Circuit wielded *Race Horse*'s equal-footing doctrine against the Crow Tribe by holding that Wyoming's admission to the Union in 1890 repealed the right to hunt under the Second Treaty of Fort Laramie. *See Repsis*, 73 F.3d at 987–93 (relying on *Ward v. Race Horse*, 163 U.S. 504 (1896)). A circuit split over this vital issue quickly emerged, leading to a grant of certiorari within three short years. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 926–29 (8th Cir. 1997), *cert. granted*, 524 U.S. 915 (1998) (No. 97-1337). The Crow Tribe, which had been shocked by *Repsis*, joined an amicus brief arguing that *Race Horse* should be overruled. *See* Brief of National Congress of American Indians et al. as Amici Curiae Supporting Respondents, *Minnesota v. Mille Lacs Band of Chippewa Indians*, No. 97-1337 (U.S. Sept. 25, 1998).

This Court apparently agreed with the amicus brief, holding that *Race Horse* "has been qualified by later decisions" because it "rested on a false premise," and that "[t]reaty rights are not impliedly terminated upon statehood." *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202–08 (1999); *see also id.* at 219–20 (Rehnquist, C.J., dissenting) (lamenting that the majority "effectively overrules *Race Horse sub silentio*"). Unlike the Tenth Circuit, this Court did not "view *Race Horse* as compelling, well-reasoned, and persuasive." *Repsis*, 73 F.3d at 994. Having succeeded in undercutting *Repsis*, the Crow Tribe advised federal and state officials that its "policy . . . shall be to exercise fully its treaty right to hunt on all unoccupied lands of the United States . . . located within the traditional Crow homeland," under the Second Treaty of Fort Laramie. *See* Crow Tribal Legislature, Joint Action Resolution No. 13-09 (May 7, 2013), *available at* https://goo.gl/sbo1Gj (observing that *Mille Lacs* "squarely rejected" *Repsis*).

To be sure, the Tenth Circuit gave an alternative basis for extinguishing the Crow Tribe's right to hunt: The Bighorn National Forest is not "unoccupied" within the meaning of the Second Treaty of Fort Laramie. *See Repsis*, 73 F.3d at 993. But the belt is no better than the suspenders, because the United States restricts occupancy of national forest lands. *See, e.g.*, 16 U.S.C. §§ 475, 551, 1604(*i*); 36 C.F.R. § 261.10; Proclamation No. 30, 29 Stat. 909–10 (Feb. 22, 1897); *United States v. Backlund*, 689 F.3d 986, 990 (9th Cir. 2012). Little wonder, then, that most courts have treated national forest lands as unoccupied for treaty-interpretation purposes. *See, e.g., Confederated Tribes of Umatilla*

Indian Reservation v. Maison, 262 F. Supp. 871, 873 (D. Or. 1966), *aff'd sub nom. Holcomb v. Confederated Tribes of Umatilla Indian Reservation*, 382 F.2d 1013 (9th Cir. 1967) (holding that national forest lands are "not occupied by white settlers," and thus are "unclaimed" within the meaning of a treaty that reserved usufructuary rights); Pet. 24–27 (collecting additional cases). It makes no sense to say that "creation of the Big Horn National Forest resulted in the 'occupation' of the land"—unless perhaps the elk are the occupants. *Repsis*, 73 F.3d at 993.

B. Retracting The Right To Hunt Will Threaten Public Health On The Crow Reservation.

Although the Second Treaty of Fort Laramie is now approaching its sesquicentennial, petitioner and his fellow "members of the [Crow] Tribe . . . depend upon their treaty-protected hunting rights to feed their families to this day." Pet. 3. By curtailing the longstanding right to hunt outside the limits of the reservation, the decision below poses a dire threat to this vulnerable population.

For centuries, the Crow Tribe has enjoyed a heavily meat-based diet that includes bison, elk, deer, antelope, and other wild game. Elk became particularly important as bison herds dwindled, offering a steady source of fresh meat, hides, and the eponymous component of the prized elk-teeth dress. *See, e.g.*, James Hagengruber, *Elk-Teeth Dress is Epitome of Crow Status and Style*, BILLINGS GAZETTE, Apr. 13, 2002, https://goo.gl/iyVc34. The Bighorn Mountains of Wyoming, located within the Bighorn National Forest that was made with the Tribe's ceded lands, are the sacred hunting grounds according to

Crow oral tradition: In the story of Big Metal, seven bighorn rams rescue a stranded Crow boy, share with him their name and powers, and promise that hunters from the Tribe of which he will be chief can always find plentiful game just by visiting the Bighorn Mountains and thinking about the rams who saved Big Metal.

Members of the Crow Tribe continue to put "food on the table during unforgiving Montana winters" by hunting elk, in the Bighorn Mountains and beyond. Pet. 29. Traditionally, elk is served to respected guests as the main ingredient in "dry meat stew." *See* App'x, *infra*. In a modern twist, petitioner nourished his children with "elk spaghetti and elk 'Hamburger Helper.'" Pet. 9 n.4. Any way you slice it, though, elk meat is good, wholesome, and traditional food, packed with healthy lean protein. *See, e.g.*, Peggy Halpern, *Obesity and American Indians / Alaska Natives* 17 (Apr. 1, 2007), *available at* https://goo.gl/za6k71 (noting that "traditional foods are high in protein and low in fat and sugar").

Losing access to off-reservation elk and other game will be especially harmful on the Crow reservation, which is located in a "food desert." *See* https://www.ers.usda.gov/data-products/food-access-research-atlas/go-to-the-atlas/ (enter "Crow Agency, MT, USA" in search box). Even members of the Tribe with money to spend have a hard time obtaining fresh meat and vegetables at a well-stocked grocery store within easy traveling distance. The Crow reservation is not unique in this regard: "In Indian Country, access to food can be a challenge. Many reservations have significant food deserts, which are

defined as low-income communities without ready access to healthy and affordable food." Anne Gordon & Vanessa Oddo, *Addressing Child Hunger and Obesity in Indian Country: Report to Congress* 5 (Jan. 12, 2012), *available at* https://goo.gl/iVZPLa. Such heightened food insecurity increases the risks of obesity, type 2 diabetes, and hypertension, among other maladies. *See id.* at 6–15; Valerie Blue Bird Jernigan et al., *Food Insecurity Among American Indians and Alaska Natives*, 12 J. HUNGER & ENVTL. NUTRITION 1 (2016).

Access to fresh meat through hunting can help to alleviate these public-health problems, as recognized by the leading federal agency in such matters:

> The Centers for Disease Control and Prevention (CDC) is committed to endorsing traditional foods as an effective approach for health promotion and diabetes prevention in American Indians and Alaska Natives . . . . Hunting and fishing rights are significant in a public health context because many tribal communities rely on these traditional foods for subsistence.

CDC Office for State, Tribal, Local & Territorial Support, *American Indian and Alaska Native Hunting and Fishing Rights*, *available at* https://goo.gl/LxSYv9. More than a century ago, the Court wrote that usufructuary rights "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). As the CDC attests, those rights remain important to the health and well-being of native populations.

* * *

The Second Treaty of Fort Laramie has been quite a deal for the United States, which received peace in the aftermath of the Civil War, along with 30 million acres of Crow territory that gave rise to what is now the Bighorn National Forest. The Crow Tribe should also enjoy the benefit of the bargain, which amounts to subsistence hunting in the forest lands it ceded away. Notwithstanding the decision below and *Repsis*, there is no basis in precedent, policy, or common sense for depriving the Tribe of that benefit. If the United States need not be held to honoring even that meager promise, then this Court should be the one to deliver the news.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 9, 2017

APPENDIX

Appendix A

Here's what's cookin' **Dry Meat Stew** *Serves* 10 to 15

Recipe from the kitchen of **Brenda Bull Shows**

5 lbs. dried elk meat

1 lb. salt pork

cover with water and boil for 1 hour

3 lbs. of potatoes, washed and quartered

add to stew and return to boil for 30 mins.

serve with fry or pan bread and berry pudding

No. 17-532

In the Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ of Certiorari to the District Court of Wyoming, Sheridan County

JOINT APPENDIX

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Petition for Writ of Certiorari Filed October 5, 2017
Petition for Writ of Certiorari Granted June 28, 2018

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Herrera v. Wyoming, No. S-17-0129, Wyoming Supreme Court, Relevant Docket Entries.. JA-12

Excerpts from Trial Transcript (Circuit Court of Sheridan Cty. Apr. 27, 2016)[1] JA-14

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Excerpt from State's Response to Motion to Dismiss (Circuit Court of Sheridan Cty. Aug. 6, 2015)..... JA-234

Motion for Status Conference re Evidentiary Hearing (Circuit Court of Sheridan Cty. Aug. 6, 2015)..... JA-235

Exhibit A to Defendant's Motion for Reconsideration, Excerpt from Wyo. Game and Fish Dep't Investigative Report (Circuit Court of Sheridan Cty. Apr. 12, 2016)..... JA-237

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[1] The transcript in this joint appendix is an unofficial transcript prepared by a third party from an official recording of the circuit court proceedings. No official transcription of the circuit court proceedings exists. The parties have reviewed this unofficial transcript and agree that it accurately portrays the circuit court proceedings in all respects relevant to proceedings before this Court.

State's Trial Exhibit 6, Email from Clayvin Herrera dated Jan. 13, 2014 ..... JA-241

State's Trial Exhibit 8, Page and Photographs from MonsterMuleys.com JA-242

State's Trial Exhibit 9, Excerpt of Email Chain Between Dustin Shorma and Clayvin Herrera JA-247

State's Trial Exhibit 10, Photographs from Facebook JA-249

State's Trial Exhibit 11, Photograph from Facebook JA-253

State's Trial Exhibit 32, Redacted Version of Appellant/Defendant Herrera's Opening Brief in District Court, Fourth Judicial District (Mar. 7, 2016) JA-257

Exhibit A to Appellee's Supplemental Brief in *Herrera v. Wyoming*, No. CV-2016-000242, Fourth Judicial District Court, Sheridan Cty. (Jan. 30, 2017) (Amended Complaint, *Crow Tribe of Indians v. Repsis*, No. 92-cv-1002 (D. Wyo. Aug. 5, 1992)) JA-255

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A

Order Denying Petition for Writ of Review, Wyoming Supreme Court, *Herrera v. Wyoming*, No. S-17-0129 (June 6, 2017) App-1

Appendix B

Order, Fourth Judicial District Court, Sheridan County, State of Wyoming, *Herrera v. Wyoming*, No. 2016-242 (Apr. 25, 2017)..... App-3

Appendix C

Order Denying Motion to Dismiss, Striking Evidentiary Hearing and Granting the State's Motion in Limine, Fourth Judicial Circuit Court, Sheridan County, State of Wyoming, *Wyoming v. Herrera*, Nos. CT-2014-2687, CT-2014-2688 (Oct. 16, 2016)..... App-36

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL DISTRICT, SHERIDAN COUNTY, WYOMING

No. CT-2014-0002688

STATE OF WYOMING,

v.

CLAYVIN B. HERRERA,

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
09/12/2014	Case Filed Citation Issued
	* * *
03/26/2015	Def's Motion Regarding Request for Bench Trial; Reserving Right To Request Change of Venue
	* * *
03/27/2015	Hard copy-Def's Motion To Dismiss Hard Copy-Def's Brief In Support Of Motion To Dismiss
04/13/2015	Response To Motion To Dismiss Response to Motion for BT
	* * *

Date Filed	Docket Text
05/04/2015	Def's Reply In Support Of Motion To Dismiss
05/18/2015	Errata Notice Regarding Def's Reply Brief In Support Of Motion To Dismiss
05/26/2015	Hearing result for Motion Hearing held on 05/26/2015 11:00AM: re: dismissal Hearing Held-Denied-Motions to be filed by 7/1
* * *	
06/15/2015	Def's Objections To Proposed Form Of Order
06/17/2015	Notice re: Submission of Order
06/25/2015	Def's Notice Of Objections To Proposed Order
07/01/2015	Order Denying Motion to Dismiss -exec by SAC
07/02/2015	Def's Motion To Dismiss Brief in Support Of Def's Motion To Dismiss Affidavit
07/02/2015	Affidavit Of Steven Small; Daniel Gallacher; Timothy P. McCleary Phd. (in brown accordian file as documents to big to put in file) [*sic*]
* * *	

Date Filed	Docket Text
08/06/2015	Response To Motion To Dismiss (in brown accordian file as documents are to big to put in file) [*sic*] Motion In Limine Re Affidavits
	* * *
08/20/2015	Motion In Limine Re Treaty Rights Supplemental Response To Motion To Dismiss (in brown accordian file as document is too big to put in file) [*sic*]
08/31/2015	Def's Response to Motion in Limine
	* * *
09/16/2015	Def's Response To The State Of WY's Motion In Limine Regarding Treaty Rights
09/18/2015	Def's Reply In Support Of Its Motin [*sic*] To Dismiss Def's Limited Response To The State Of WY's Assertion Of "Conservation Necessity"
	* * *
10/05/2015	2nd Supplemental Response To Motion To Dismiss
	* * *

Date Filed	Docket Text
10/16/2015	Order Denying Motion To Dismiss, Striking Evidentiary Hearing & Granting The State's Motion In Limine exec SAC
* * *	
11/04/2015	Petitioner Herrera Petition For Writ Of Review; Certiorari; Prohibition
11/13/2015	Notice of Appeal
* * *	
11/19/2015	Response To Petition For Writ Of Review; Certiorari; Prohibition
11/20/2015	Motion To Avoid Delay Due To Appeal
12/04/2015	Def's Response To The State's Motion To Avoid Delay Due To Appeal
* * *	
04/11/2016	Def's Motion To Stay def's motion to stay denied cc CA; Gray Objection To Def's Motion To Stay
* * *	
04/12/2016	Motion In Limine
* * *	

Date Filed	Docket Text
04/13/2016	Def's Motion For Reconsideration Of Order Granting Stat'es Motion In Limine Re Treaty Rights [*sic*]
04/14/2016	Response To Motion To Reconsider & Motion In Limine For Offer Of Proof
	* * *
04/18/2016	Order After Pre-Trial Conference exec SAC
	* * *
04/19/2016	fax file: Def's Motion To Clarify Order After Pre-Trial Conference
04/20/2016	fax file: Order Granting Motion To Clarify Order After Pre-Trial Conference exec SAC (copy) Petitioner Clayvin Herrera's Emergency Motion To Stay Trial Court Proceedings While Appellate Review Is Sought (copy) Petitioner Clayvin Herrera's Petition For Writ Of Review From District Court Order Dismissing Appeal; For Writ Of Certiorari Or Mandamus; & Emergency

Date Filed	Docket Text
	Petition For Stay Of Apr 27 2016 Trial In Circuit Court
04/21/2016	Hard Copy: Def's Motion To Clarify Order After Pre-Trial Conference & Order Granting Motion To Clarify Order After Pre-Trial Conference exec SAC
04/22/2016	State of WY Response In Opposition To Petitioner Clayvin Herrera's Emergency Motion To Stay Trial Court Proceedings While Appellate Review Is Sought
04/25/2016	(copy) Petitioner Clayvin Herrera's Reply To Emergency Motion To Stay Trial Court Proceedings While Appellate Review Is Sought
04/26/2016	Order Denying Motion for Stay -WSC Motion in Limine for Judicial Notice Motion in Limine re: def's defense of reasonable mistake & objection to witness testimony
* * *	

Date Filed	Docket Text
04/27/2016	Memorandum Of Law RE Reliance On Official Misstatement Of Law
04/28/2016	Order Denying Motion for Stay -WSC Memorandum RE WRE 106
04/29/2016	Hearing result for Jury Trial held on 04/27/2016 09:00 AM: Criminal Jury Trial Held - Guilty Guilty (Guilty 23-06-205 b (801) ACCESSORY AFTER THE FACT) Judgment & Sentence entered Probation Imposed (23-6-205 b (801) ACCESSORY AFTER THE FACT) Probation term: 1 year (Unsupervised) Jail Term (23-6-205 b (801) ACCESSORY AFTER THE FACT) Confinement terms: Jail: 1 year. Suspended jail: 1 year. Verdict form
05/05/2016	(from Supreme Court WY) State Of WY Response To Petitioner Petition For Writ Of Review From District Court Order Dismissing appeal &

Date Filed	Docket Text
	For Write [*sic*] of Certiorari or Mandamus
	* * *
05/26/2016	Notice of Appeal Motion To Stay Fine Pending Appeal Judgment Appealed Order Granting Motion To Stay Fine Pending Appeal exec SAC
08/01/2016	Notice of Appeal from District Court
10/13/2016	Motion to Correct Omission From Record
10/18/2016	Order For Correction Of Omission From Record -from District Court
10/27/2016	Order Correcting Omission from Record -exec by SAC

FOURTH JUDICIAL DISTRICT COURT,
SHERIDAN COUNTY, STATE OF WYOMING

No. CV-2016-000242

CLAYVIN B. HERRERA,

v.

STATE OF WYOMING.

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
07/28/2016	Notice of Appeal Filed
7/28/2016	Letter to Appellant's Attorney re: Appeal Docketed/Setting Briefing Schedule 1c: Circuit
9/14/2016	Appellant/Defendant Herrera's Opening Brief
9/14/2016	Appellant's Appendix
9/14/2016	Appellant's Designation of Record
* * *	
09/16/2016	Appellant's Supplemental Appendix
09/23/2016	Motion of Indian Law Professors, Debra Donahue, Maylinn Smith, and Monte Mills for Leave to File Amicus Curiae Brief in Support of

Date Filed	Docket Text
	Appeal of Appellant Clayvin B. Herrera
09/26/2016	Motion of Crow Tribe of Indians for Leave to File Amicus Curiae Brief in Support of Appeal of Clayvin B. Herrera
10/13/2016	Motion to Correct Omission from Record
10/13/2016	Appellee's Designation of Record
10/13/2016	Brief of Appellee
* * *	
10/13/2016	Appellee's Appendix
* * *	
10/14/2016	Order for Correction of Omission from Record
10/31/2016	Appellant/Defendant Herrera's Reply Brief
11/08/2016	Order Setting Hearing - Oral Arguments (12/9/16 @10:30 am)
12/14/2016	Order Requiring Additional Briefing (Due 1-30-2017) 1c: Dessa Reimer
12/14/2016	Order Denying Motion for Leave to File Amicus Curiae Brief (Denied) 1c: Debra Donahue, Maylinn Smith,

Date Filed	Docket Text
	Monte Mills, Dessa Reimer, AG's Office
12/14/2016	Order Granting Motion for Leave to File Amicus Curiae Brief (Granted)1c: Andre Irvine, Dennis Bear Don't Walk, Dessa Reimer, AG's Office
01/30/2017	Appellant/Defendant Herrera's Supplemental Brief Regarding the Doctrines of Collateral Estoppel/Issue Preclusion and Res Judicata/Claim Preclusion
01/30/2017	Appellee's Supplemental Brief
04/25/2017	Opinion on Appeal (Affirmed) 1c: Circuit Court, Dennis Bear Don't Walk
06/08/2017	Order Denying Petition for Writ of Review
07/02/2018	Letter from U.S. Supreme Court re: Petition for Writ of Cetiorari Granted

SUPREME COURT OF WYOMING

No. S-17-0129

CLAYVIN B. HERRERA,

v.

STATE OF WYOMING AND THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT, SHERIDAN COUNTY.

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
05/10/20107	Event - Docketed and indexed
05/10/2017	Fees - Docket fee received
05/10/2017	Petitioner Clayvin B. Herrera's Petition for Writ of Review
* * *	
05/22/2017	Motion - Amicus - leave to participate (Indian Law Professors); and received proposed amicus curiae brief
05/22/2017	Motion - Amicus - leave to participate (Crow Tribe of Indians); and received proposed amicus curiae brief
05/25/2017	Response in Opposition to Petition for Writ of Review
* * *	

Date Filed	Docket Text
05/31/2017	Reply to State of Wyoming's Response in Opposition to Petition for Writ of Review
* * *	
06/06/2017	Order - Denying petition for writ of review
06/06/2017	Event - Case closed

Excerpts from Trial Transcript
Circuit Court of Sheridan County,
State of Wyoming
April 27, 2016

[123] DUSTIN SHORMA,

called for examination by Plaintiff, being first duly sworn, testified as follows:

THE COURT: Thank you. Be seated.

DIRECT EXAMINATION

Q. (BY MR. LAROSA) Good afternoon. Could you please state your name.

A. Dustin Shorma.

Q. Where do you live, sir?

A. I live in Dayton, Wyoming.

Q. What do you do?

A. I'm the district game warden there.

Q. The -- what entity do you work for?

A. I work for the Wyoming Game & Fish Department.

Q. You're the principal investigator in the case at issue here, yes?

A. That's correct.

Q. How long have you worked for Wyoming Game & Fish?

A. I've been with the Game & Fish for 18 years. I've been a game warden for 17 of those.

Q. How long have you been in this area as a warden?

A. I have been in Dayton for almost five years now.

Q. Where did you work with Game & Fish as warden or any other capacity before you came here?

[124] A. I've been stationed in several other places. I was stationed in Casper, Newcastle, Jackson, Lander and Green River.

Q. Where were you born and raised?

A. I was born and raised in Sheridan.

Q. What did your father do?

A. Excuse me?

Q. What did your father do?

A. My father was the regional wildlife supervisor for the Game & Fish here in Sheridan.

Q. When you grew up, did you spend time outdoors in these parts?

A. A lot, yes.

Q. Where did you get the basic training you need to do the job that you do?

A. Well, I received training from several different places. I guess to start with, a requirement of warden is to have a degree in Wildlife and Fisheries Management. So I obtained a bachelor's degree from the University of Wyoming, graduating in 1999.

Q. Why is it important to have that?

A. It's in state statute.

Q. Oh, okay. When you get that training, do you learn about species identification?

A. Yeah. Mammalogy, morphology, wildlife [125] management, fisheries management.

Q. All right. So you got that. What do you have to do on top of that to then become a warden?

A. Well, to become a warden in Wyoming, there's a couple of different steps that an individual needs to take. It first starts with a written test. Depending on your score on the written test, you then go on -- at least at the time I took it, we went on to an oral board. The oral board asked us a lot of questions as far as our experience, our past, you know, kind of give you some situation-type scenarios. After the oral board, you proceeded on to a psychological profile and interview with a psychologist.

Q. Did -- by this test, is it a test -- do you have to establish proficiency?

A. It's a proficiency. It's just general wildlife knowledge, species knowledge, hunting, tracking, fishing knowledge. It's a real roundabout way to see what kind of expertise an individual has before the oral board has a chance to sit and talk with them.

Q. All right. Do you know how to collect field samples as part of an investigation in doing your job?

A. I do. I've taken several classes on field forensics, field firearm forensics, evidence packaging and handling, GPS technology, mapping technology, tracking, [126] that sort of stuff.

Q. Do you know how to -- have you received any training in preserving biological specimens for DNA testing?

A. Yes.

Q. All right. What are your duties?

A. Well, the duties of a game warden -- essentially Wyoming is split up into 50 different game warden districts. Within that district the game warden is responsible for obviously enforcing the Fish & Game laws in the state of Wyoming. We also have law -- excuse me, biological duties as far as assisting the biologists with wildlife management. Data collection and season setting. We're also a point of contact for the public to discuss issues involving Game & Fish or just kind of like a public information/education-type person for your district, as well as taking care of like nuisance, injured wildlife calls, dealing with wildlife damage, that sort of thing.

Q. Do you have authority to issue citations?

A. I do.

Q. Make arrests?

A. I do.

Q. Are you a peace officer?

A. I am.

Q. The things that you do, do they require that you [127] spend time in the field?

A. Yes.

Q. To carry out the basic tasks that you have, how -- how important is it -- is it important that you know your territory?

A. It's absolutely imperative. You know, most of the older game wardens will tell you, you know, having an intimate relationship with your district -- I mean, knowing every drainage, every fence post, every landowner, every drainage, it's very important for -- to -- to be an effective game warden.

Q. How did you get to know the Dayton district when you got here?

A. Essentially spending time talking to landowners, research reconnaissance, spending time out in the field, driving around, seeing country, taking roads that you've never been on, talking to sportsmen.

Q. You use maps in doing what you do?

A. Yes.

Q. The -- describe the Dayton district, where it is, please.

A. The Dayton district essentially is the top north strip of Sheridan County. The boundary starts essentially from the Sheep Mountain Road at the Montana line. It follows the Montana-Wyoming border to the Passaic Road in [128] eastern Sheridan County. Follows the Passaic Road south to the SR Buffalo Creek Road. Going west into Sheridan via the Wyarno Highway and district. Then continues west on 5th Street, Soldier Creek Road, the Beckton Road into Dayton, then it connects with Highway 14 at Burgess Junction, where 14A and 14 split. It continues on Highway 14A to the Devil's Canyon Road back to the Sheep Mountain Road back to Montana state line.

Q. And that was long enough I may have forgotten where you started. But the northern part of that, does it border the state of Montana?

A. Yes. For about 80 miles.

Q. And does it border the Crow Reservation?

A. Yes.

Q. The -- what's a hunt season?

A. A hunting season, essentially the biologist and wardens for a hunt area put together a recommendation based on essentially science, public comment, and formulate seasons specific to the animal that is going to be harvested. We formulate a season. We take public comment. We bring the season as a recommendation to our essentially Game & Fish commission, which is the private, you know, just normal layman committee that kind of oversees our organization, and then they vote to approve the season. Once it's approved by them, the governor [129] signs it.

Q. So what -- and you said it was season specific. So is it fair in understanding that hunt area is a geographic area for a particular species?

A. That's correct.

Q. All right. With respect to elk, what hunt areas are in the Dayton district?

A. My district encompasses Hunt Area 38, a small portion of Hunt Area 37 and Area 129.

Q. I think you intimated at this already, but what is the entity that has the power to set seasons for species in the state of Wyoming?

A. The Game & Fish Commission.

Q. And they have authority to set established hunt areas also?

A. That's correct.

Q. All right. I believe you've already established what they do -- how they do that. The -- do they publish information with respect to the seasons for the public?

A. They do.

Q. Do they do this in print?

A. Yes.

Q. Do they do this online also?

A. Yes.

Q. Does the Game & Fish Commission have a website [130] you can go get this information?

A. Yes.

Q. The -- okay.

MR. LAROSA: May I approach, Your Honor?

THE COURT: Yes.

Q. (BY MR. LAROSA) I'm going to show you State's Exhibits 1 and 2 and ask you if you recognize them.

A. Yes.

Q. What State's Exhibit 1?

A. State's Exhibit 1 is the Wyoming Game & Fish Commission's 2013 elk hunting regulations.

Q. What's State's Exhibit Number 2?

A. Number 2 is the 2014 Elk Hunting Regulation.

Q. All right. In those two documents can you find the season for Hunt Area 38 in -- in -- in Exhibit 1 with respect to 2013?

A. Yes.

Q. Can you also see the description of what Hunt Area 38 is in that booklet?

A. Yes.

Q. All right. The same question really for State's Exhibit 2. The -- can you see when the seasons for elk were in 2014 in that booklet?

A. Yes.

Q. All right. Can you see where Hunt Area -- what [131] Hunt Area 38 is described as in 2014?

A. Yes.

Q. All right. Now I'll show you State's Exhibit 3 and 4. You can keep these here. The -- and what I'm asking you is what -- do you see what they are?

A. Yes.

Q. What is State's Exhibit 3?

A. It's the 2013 elk regs with essentially Hunt Area 38 and the boundary for Hunt Area 38 written.

Q. All right. And what about State's Exhibit 4?

A. It's the 2014 Elk Hunting Regulations with the page for the hunting season in Area 38 in 2014, as well as the written boundary -- the boundary description.

Q. So can you see, in examining that -- so it's essentially an excerpt from the booklets?

A. Yes.

Q. Can you see, in examining the excerpt, whether the season was open or closed in January of 2014?

A. It was closed.

MR. LAROSA: Well, the State would move the admission of State's 3 and 4 at this time.

THE COURT: Any objection?

MS. GRAY: Yeah. We object to that, Your Honor. We think that the complete 1 and 2 as I understand are a complete booklet, and under the Rules of Evidence [132] 106, the complete document is the better evidence.

THE COURT: Mr. LaRosa?

MR. LAROSA: Well, I don't know the other hunt areas are going to be relevant to anything we're doing here. It's a mass of information that the jury does not need to be burdened with, and it's tailored precisely to the facts that are necessary in this case, and that's all we're trying to admit.

MS. GRAY: We disagree, Your Honor. We think the complete -- 1 and 2 are the ones that should be admitted.

THE COURT: I can resolve that. I'm going to admit all four. That way the complete manuals are admitted and the specific excerpts for purposes of the jury's convenience.

(State's Exhibit Nos. 1, 2, 3 and 4 received in evidence.)

MS. GRAY: Thank you, Your Honor.

THE COURT: All right.

MR. LAROSA: I guess the State would ask permission to publish at this time.

THE COURT: Yes.

Q. (BY MR. LAROSA) In those two booklets, are there -- is there a map that shows the hunt areas in the respective years?

[133] A. Yes.

Q. And does Hunt Area 38 remain the same from year -- is it the same in those two years?

A. Yes.

Q. I'm going to show you State's Exhibit 5. Do you recognize what I've showed you?

A. Yes.

Q. And what is that?

A. It's essentially the state of Wyoming split up into elk hunt areas, as well as the herd unit boundaries.

Q. All right. Is that map contained in those booklets?

A. Yes.

Q. All right. Does it give the jury some idea of the geographic location of Hunt Area 38 in Sheridan County?

A. Yes.

MR. LAROSA: State would move its admission.

MS. GRAY: No objection, Your Honor.

THE COURT: Exhibit 5 is admitted.

(State's Exhibit No. 5 received in evidence.)

MR. LAROSA: Permission to publish.

THE COURT: You may publish.

[134] Q. (BY MR. LAROSA) So you stated that the season was closed in January. All of January?

A. Yes.

Q. 2014, that is.

A. Yes.

Q. In that month, were there incidents of poaching that came to your -- or violations of out-of-season hunting that came to your attention?

A. Yes.

Q. Okay. Do you know the gentleman seated next to Ms. Gray at defendant's table?

A. Yes.

Q. Who is that?

A. It's Clayvin Herrera.

Q. Have you personally met him before?

A. Yes.

Q. When did you personally meet him?

A. I met him on January 30, 2014.

Q. When you met him, what was his occupation at the time?

A. He was a captain for the Crow Tribal Fish & Game.

Q. All right. How long had he been with Tribal Fish & Game at the time you met?

A. Two years.

[135]

Q. Where did he live at that time?

A. He lived on the Crow Reservation.

Q. All right. After you met him, did you have occasion in the ensuing months to investigate him for offenses?

A. Yes.

Q. Did you subsequently cite him?

A. Yes.

Q. The cited offenses, in what month did -- did you allege that they occurred?

A. January of 2014.

Q. Let's talk about how you came to meet Mr. Herrera. The -- who took the first action that resulted in contact? Was it him or was it you?

A. It was him.

Q. Please describe what happened.

A. I was in the regional office in Sheridan one day and my supervisor stopped me in the hall and said that he had received an email from the Wildlife Division who had received an email from our website. And he said there was somebody from the tribe who was interested in essentially catching poachers along the state line, and he asked me if I'd be interested in contacting that individual.

Q. All right. So it sounds like Wyoming Game & Fish has -- does Wyoming Game & Fish have an online [136] address?

A. On our Web page we have kind of just a generic, you know, contact us link that people can send messages to the Game & Fish.

Q. What happens when somebody sends a message to that general address?

A. It kind of gets sorted based on the topic, and, you know, I guess would be the best person to address it based on their area of expertise. So like fish questions go to fisheries biologists; wildlife questions go to wildlife biologists; law enforcement issues come to the game wardens.

Q. And what was the date that this email was sent?

A. It was January 13th of 2014.

Q. And what's the path it followed?

A. It was -- it was sent to our Web server, who forwarded it to our administrative assistant for the

chief game warden. Her name is Bea. Bea forwarded it to my supervisor who forwarded it on to me.

Q. All right. And do any of you still have that chain of messages on your computer?

A. Yes.

Q. The -- okay. The -- and so it was -- and when it was forwarded to you, did you read it?

A. I did.

[137] Q. The -- and you said -- did you say who Mr. Gilbert was, by the way? I'm sorry.

A. He's the regional supervisor for the Sheridan region of Game & Fish. Regional wildlife supervisor.

Q. And -- all right. Let me show you State's Exhibit 6. Do you recognize what I'm showing you?

A. Yes.

Q. What is it?

A. This is the email that was forwarded on to me from my supervisor.

Q. All right. And does it -- can you see the email address that it came from?

A. Yes.

Q. All right. And is there a -- is there a message contained in that email?

A. Yes.

Q. All right. And in that message, is there a phone number listed?

A. There is.

Q. And have you subsequently, since the time you received that, have you called that phone number?

A. Yes.

Q. All right. You called that phone number, who did you speak with?

A. I spoke with Clayvin Herrera.

[138] Q. Okay. Have you, subsequent to receiving that email, ever sent email to the email address that it came from?

A. Yes.

Q. All right. Have you done that -- how many times have you done that?

A. Four or five.

Q. Have you ever received a response from that address?

A. Yes.

Q. When you did, who was responding?

A. Clayvin Herrera.

Q. All right. Has -- when meeting with the defendant in person, has he ever told you that this was his email address?

A. Yes.

Q. When meeting with the defendant in person, has he ever told you that the phone number in the message is his phone number?

A. Yes.

MR. LAROSA: State would move the admission of State's Exhibit 6.

MS. GRAY: No objection.

THE COURT: 6 is admitted.

(State's Exhibit No. 6 [139] received in evidence.)

Q. (BY MR. LAROSA) Could you please read the message.

A. Yes. "Greetings. I would like to contact anyone who has an interest in poachers, especially poachers near the border with the Crow Indian Reservation in Montana. We would like to start building relationships with our neighbors that would be mutually beneficial. Please email me back or call me at (406) 839-8830. I would like to help in any way we can to catch violators near our mutual borders. Thanks. Clayvin Herrera, Captain, Crow Fish & Game."

Q. Is there a symbol on that email?

A. Yes.

Q. What is it a symbol of?

A. It's a symbol of -- that the Crow Tribe uses.

Q. Have you seen that symbol before?

A. Yes.

MR. LAROSA: Permission to publish, Your Honor.

THE COURT: You may publish.

Q. (BY MR. LAROSA) After you got that message and read it, what did you decide to do?

A. I contacted Mr. Herrera.

Q. Why did you decide to contact Mr. Herrera?

[140] A. Late December, early January of -- late December 2013, early January of 2014 I was having a lot of poaching incidents along the state line, and I wasn't getting anywhere with any of them. So, you know, I -- I thought it was a sincere, you know,

outreach on his part to try to maybe work together to catch some of these people, so I contacted him for his help.

Q. Had you had this type of cooperation before?

A. No.

Q. These poaching incidents that you're referencing, were any of them happening in Hunt Area 38?

A. Yes.

Q. The -- okay. How did you reach him? Were you able to reach him?

A. I was.

Q. And how did that happen?

A. I called the number on the email.

Q. Did he answer?

A. Yes.

Q. All right. And when did that happen?

A. It would have been sometime between the 21st and 24th of January.

Q. What, if anything, did you suggest that the two of you do?

A. Well, I had an instance where a couple elk had [141] been killed on the Wyoming side of the state line, and there was also a spike bull elk that was shot and left on the Crow side of the state line. So I called to tell him about it, and we arranged to meet so I could show him that spike and we could talk.

Q. This location that you were aware of, was it -- is it near -- how close is it to your mutual border?

A. Where we -- where we physically met?

Q. Yeah. Or where you suggested to meet.

A. Like 250, 300 yards from the state line.

Q. What's the hunt area across on your side at that location?

A. Area 38.

Q. The -- is it fenced at that location?

A. Yes.

Q. The -- does it have a name, that certain area that you described?

A. They call it -- the locals know it as Rocky Bottom. I told him to meet near the junction of the Red Gap and -- essentially Red Gap, Pass Creek and Little Horn Road.

Q. Was he familiar with the place when you suggested that location by name?

A. Yes.

Q. Did he require directions?

[142] A. No.

Q. Did you arrange for -- at a time to meet?

A. 10:00.

Q. The -- and did that meeting subsequently take place?

A. Yes.

Q. The -- let's discuss what happened at (unintelligible) the -- let's discuss what you did when you first met.

A. I introduced myself. There were some other individuals with him. We all kind of, you know, introduced ourselves to one another. We drove up the

Little Horn a little bit and walked up and I showed him the spike bull on the Crow Reservation that had been shot and left. When we were done looking at that, we went back to our trucks and we talked. He was interested in knowing what I knew about these poaching incidents. He was interested in knowing who I suspected was responsible for these poaching incidents. He was curious as to the capabilities of our forensic laboratory in Laramie.

Q. Let me stop you for a minute. You said you -- he was interested in whom you suspected. In your discussion, did you disclose any suspicions that tribal members might be involved in some of the offenses?

A. I did.

[143] Q. All right. And what was his interest when you mentioned that?

A. He wanted to know specifically who -- who I was looking at.

Q. Did you give him any names?

A. I did.

Q. Do you recall any of them?

A. I told them DL Singer.

Q. Was he familiar with DL Singer?

A. He didn't seem like he was.

Q. Okay. Did he give you any names of tribal members to address what you were talking about?

A. Yes.

Q. What names did he give you?

A. He gave me Daniel Takes Animal.

Q. All right. You mentioned that he asked you some questions about capabilities. Please go into that.

A. Well, like I guess the capabilities, can our labs match carcasses to heads, like with DNA. You know, just what kind of abilities they had to help us solve wildlife crimes, essentially. DNA was a big one, you know, matching heads back to headless carcasses.

Q. The -- is that something you do to solve investigations?

A. Yes.

[144] Q. The -- okay. And did -- does our lab have those capabilities?

A. Yes.

Q. And did you explain that?

A. I did.

Q. What type of analysis do they do to establish that -- a rack that's been taken or found in another location matches remains found elsewhere?

A. They got essentially wildlife databases specific to species that if they get a deer carcass without a head and they came upon a head during the course of an investigation, they can genetically -- DNA -- they can match the two to show it's the same animal.

Q. Okay. And did you basically tell them all of this?

A. Yeah.

Q. What did you say about -- if anything, about his organization and its abilities?

A. He kind of wanted to assure me this wasn't the tribal Fish & Game of old. That their officers were highly trained and professional.

Q. All right. As a result of this meeting -- and what's the date of this meeting?

A. January 30th.

Q. All right. And as a result of that meeting -- [145] and what do you guys agree to do, if anything?

A. We agreed to share information with one another as, you know, these, you know, poaching kind of popped up, we'd kind of share information if they're along the state line.

Q. Did he provide you any contact information while you were still there?

A. Yes.

Q. All right. Let me show you State's Exhibit 7. You recognize what I'm showing you?

A. Yes.

Q. What is that?

A. This is the -- essentially the Crow Nation Fish & Game Bison Regulations that -- this is the one that he gave me at that meeting.

Q. All right. And you answered earlier that on an occasion he's confirmed that the email address was his and the telephone number and that email was his.

A. Yes.

Q. How did he do that?

A. He wrote his email address on the back of it and he scratched out one of the old numbers that he had

and wrote in a new number underneath it. New cell number.

Q. Okay. What did you do after that meeting?

A. Well, honestly on the way home, I was -- was [146] kind of, I don't know, maybe excited that I'd be able to solve some of these cases. But by the same token, it bothered me, some of the conversations that we had. I started kind of thinking like I was maybe being taken advantage of, I guess.

Q. What did you do that night?

A. When I got home, I -- I got on Google and typed in Clayvin's name and went to other -- on Google, you can -- there's a bunch of tabs, like Internet search, images, you know, shopping or whatnot. I went to the images section, it popped up under Google and saw a whole bunch of photographs of Clayvin posing with trophy elk, trophy mule deer, trophy whitetail deer.

Q. Okay. When you did that, did it take you to any specific locations on the Internet?

A. It took me to -- I clicked on an elk photograph and it took me to a website known as monstermuleys.com.

Q. What is monstermuleys.com?

A. Monster Muleys is kind of a bragging board, I guess. And it's got like a forum component to it so hunters can like share information and show pictures of them with their animals that they've harvested.

Q. Were you aware, prior to ending up at that site when you did what you did that night, were you familiar that such sites exist?

[147]

A. I had known about it from like past investigations, but I didn't spend any time actively looking at it I guess.

Q. Are there sites other than Monster Muleys that do the same thing?

A. Yes.

Q. The -- and -- and are they, I guess, within some sphere, are they reasonably popular?

A. Yes.

Q. The -- okay. And were any of the animals that you saw him posing with elk?

A. Yes.

Q. And when you saw these pictures, you recognized it was Clayvin Herrera in those pictures?

A. Yes.

Q. The -- okay.

(Unintelligible side conversation between counsel.)

MS. GRAY: We're fine with the unredacted version.

MR. LAROSA: The unredacted?

MS. GRAY: Uh-huh.

MR. LAROSA: Okay. Thank you.

Q. (BY MR. LAROSA) All right. And --

MS. GRAY: What number is it?

[148] MR. LAROSA: That's 8.

Q. (BY MR. LAROSA) And I'm going to show you State's Exhibit 8. It is -- has a total of five pages. And so I'd like you to take a moment and examine each of

those five pages, please. Do you recognize what that is?

A. Yes.

Q. What is it?

A. This is -- these are essentially the photographs that were posted on the Monster Muleys website. This is the Monster Muleys website, actually.

Q. Okay. And does it show the title of the posting that you saw when you went and found those photos?

A. Yes.

Q. And does it contain the text that was posted along with the photographs when these photos were posted to Monster Muleys?

A. Yes.

Q. All right. And do you know -- what's -- who's in the first -- what do you see in the first photo?

A. The first photo is Clayvin Herrera posing with a mature bull elk.

Q. And what's in the second photo?

A. The second photo is Clayvin Herrera posing with the previous photo of a bull elk head and appears to be a back strap around his neck.

[149] Q. All right. And what is in the third photo?

A. The third photo is a dead bull elk with two individuals shaking hands.

Q. All right. And what's in the fourth photo?

A. The fourth photo is a young man holding a bull elk head.

Q. All right. And what's in the fifth photo?

A. The fifth photo is a young lady with a buck mule deer.

Q. The now -- let me ask you a couple of questions. On the date that you found this on Monster Muleys -- and this is the evening of January 30th, correct?

A. Correct.

Q. The two individuals in the photo on page 3, did you know who they were?

A. I knew who one of them was, but I didn't know which one he was.

Q. And are they -- does the post itself identify who they are?

A. Yeah. It says it's Ronnie Fisher, and it tells you what picture he's in.

Q. All right. And do you know who all the people -- and this post basically identifies these individuals?

A. Yes. The --

[150]

Q. And what's the -- the -- and have you found the sites where any of these photos were taken?

A. Yes.

Q. All right. Which -- which sites have you found?

A. I found all of them but the young lady posing with the mule deer buck.

Q. All right. And were all those sites in the state of Wyoming?

A. Yes.

Q. Have you been able to retrieve any of the elk rack heads that are seen in any of the photos?

A. Yes.

Q. The -- and are those the racks that you retrieved in this investigation?

A. Yes.

MR. LAROSA: The State would move the admission of State's Exhibit 8.

THE COURT: Any objection?

MS. GRAY: No objection.

Q. (BY MR. LAROSA) And what's the title of the post?

THE COURT: 8 is admitted.

(State's Exhibit No. 8 received in evidence.)

Q. (BY MR. LAROSA) What was the -- what was the [151] post to Monster Muleys called?

A. The post was called Good Year on the Crow Reservation.

Q. And when was it posted to the Monster Muleys forum?

A. It was put on there January 23rd.

Q. Okay. The rack that's in the photos with Clayvin Herrera, who did you get that rack -- you said you were able to get them, who did you get that from?

A. I recovered that rack from Clayvin Herrera.

Q. The one in the photos with the two individuals -- what are their names?

A. It's DL Singer and Ronnie Fisher.

Q. Did you get the rack in that photo from either of them?

A. I did. I recovered it from Ronnie Fisher.

Q. And page 4, who was -- who was the individual in that photo?

A. This is Colton Herrera, Jr.

Q. Were you able to retrieve the rack in that photo?

A. I was.

Q. Who did you get that from?

A. His father, Colton, Sr.

MR. LAROSA: Permission to publish.

[152] THE COURT: Yes, you may publish.

Q. (BY MR. LAROSA) Okay. What happened? What was going on in your district as you moved into February?

A. I was having -- finding and having reported to me more and more elk being shot and killed in Wyoming.

Q. The -- were any of these violations happening in Hunt Area 38?

A. All of them were Hunt Area 38.

Q. Did you -- did you make any further contact with Mr. Herrera to seek the cooperation which he said would be available?

A. I did.

Q. How did you do that?

A. I reached out to him via email.

Q. And did you have a specific reason -- and what month was that?

A. It was in February.

Q. Did you have a specific reason why you contacted him in February of 2014?

A. I -- I found a large bull elk that had been shot off the Pass Creek Road, and the only thing that had been taken was a little bit of back straps and head had been removed. And I was just curious to know if he heard or seen anything that might have involved that bull.

Q. Did you send it to the email address that he [153] gave you on the booklet and -- the email address that he used to make first contact with you?

A. Yes.

Q. The -- and did he respond?

A. He did.

Q. And do you still have that -- do you still have a record of that on your computer?

A. I do.

Q. Show you State's Exhibit 9 now. Take a moment to read it, please. And please tell me if it is that communication -- both the email you sent and then what -- the one you received in response.

A. Yes, it's the email I sent and the one I received back from Clayvin.

Q. All right. And does he -- in your email, do you identify the kind of -- the -- the location where you found it?

A. Yes.

Q. And does he offer to help you?

A. Yes.

Q. Does he offer to help you in a specific way?

A. Yeah, he --

Q. You can just say yes.

A. Yes.

MR. LAROSA: The State would move the [154] admission of State's Exhibit 9.

MS. GRAY: No objection.

THE COURT: 9 is admitted.

(State's Exhibit No. 9 received in evidence.)

Q. (BY MR. LAROSA) The -- what -- so -- just summarize your message. It's kind of long, but basically what did you tell him and then what was his response?

A. My message was that I had a poaching case that I was working on. I didn't know if anybody had come into his office looking for a transportation tag. I kind of told him the timeline of when I found it and asked him if he had heard or knew anything. And if he had, he could contact me.

Q. All right. And essentially does -- is this -- did you suspect a tribal member might be involved?

A. I did.

Q. What was -- read his response, please.

A. "Dustin, hey, sorry I haven't responded. I've been out of the office for a couple of weeks on the road promoting bison hunting in Salt Lake City, Utah. Give me some good locations and I can throw them up on a map as well as the dates. Let's get those poachers."

Q. All right. Thank you.

MR. LAROSA: Permission to publish.

[155] THE COURT: You may publish.

Q. (BY MR. LAROSA) Do you use maps in doing what you do?

A. I do.

Q. The -- do you try to be pre -- why do you use maps?

A. I use maps, obviously, for navigation, knowing where I'm at. But also processing crime scenes, documenting wildlife distribution, documenting land boundaries of private landowners, that sort of thing.

Q. Were you at all surprised that he apparently used maps also?

A. No. Huh-uh.

Q. The -- okay. Let's -- what's the date of his response? Or just approximately, if you don't have it anymore.

A. It was two weeks after I -- it was February 24th, I believe.

Q. So still February?

A. Yes.

Q. What happens -- what's going on now, as we move into March?

A. I was continuing to receive reports and finding carcasses on my own, bull elk and -- that had been shot along the state line.

[156] Q. What's your reaction to these unfolding events? What are you doing now?

A. I was getting pretty desperate. I mean, you know, the public, you know, entrusts a game warden to enforce the game laws. It was rather embarrassing finding all these elk, and I had no evidence on any of

them to tie people to. It was -- it was getting frustrating. And I was exhausting every lead to try to find some thread of evidence that could be used to solve one of these cases.

Q. And these additional cases, how many of them are actually in Hunt Area 38 in proximity of the border?

A. All of them.

Q. All right. So what did you do in an attempt to get a lead?

A. Well, based on some of the evidence, you know, the way vehicles were coming and going, it was obvious to me that there was a possibility that it was members from the Crow Tribe who were responsible for some of this. So I got on some of these forum sites that have pictures of dead elk, and I just started downloading pictures and taking note of names who was -- who the hunters were and where they said they were and saving all that to my computer.

Q. All right. Did you form any impressions from the sites of these photographs?

[157] A. Yeah. A couple of them looked like they were in Wyoming.

Q. Okay. And you -- so you say you downloaded them and preserved them for later review?

A. Yes.

Q. You mentioned earlier that some -- the identity of the individuals in the photos that you found at Monster Muleys were Clayvin Herrera, DL Singer, Ronnie Fisher and Colton Herrera, Jr., correct?

A. Yes.

Q. Did you do anything specific to any of those individuals?

A. Yes. I went to their Facebook pages and looked at postings they had made. Anything that had an elk picture or any relevance to elk hunting, I saved to my computer.

Q. Did you go to the Facebook page for Ronnie Fisher?

A. I did.

Q. Did you go to the Facebook page for DL Singer?

A. I did.

MS. GRAY: Is that redacted?

MR. LAROSA: That is, yes.

(Unintelligible side conversation between counsel.)

[158] MS. GRAY: (Unintelligible) why don't you ask him if he remembers what it says.

MR. LAROSA: Okay.

Q. (BY MR. LAROSA) I'm going to show you two exhibits. State's Exhibits 10 and 11. Let's do them in turn, please. What is State's Exhibit 10?

A. State's Exhibit 10 is Facebook pictures, as well as comments made on those pictures that I downloaded.

Q. All right. And is this what you -- when, approximately, is the date that you went to the Facebook posting of Ronnie Fisher?

A. April 26th.

Q. And does the State's Exhibit 10 show what you saw?

A. Yes.

Q. All right. Is anything that you saw there something that you had seen previously on Monster Muleys?

A. Yes. The picture of the two individuals shaking hands that was on Monster Muleys is also on Ronnie Fisher's Facebook page.

Q. All right. And are you familiar with the -- with -- and are you -- are you familiar with Facebook yourself?

A. Yes.

Q. The -- do you -- do -- have you ever utilized [159] Facebook yourself?

A. Yes.

Q. The -- have you ever posted anything on a Facebook page, either yours or anybody else that you know?

A. Yes.

Q. All right. And when you do, does Facebook basically record the posting and put it on the page?

A. Yes. It puts a --

Q. And when that happens, is the date and time that you made that posting recorded and preserved on the page?

A. Yes.

Q. The -- all right.

MR. LAROSA: And State would move the admission of State's Exhibit 10.

MS. GRAY: No objection.

THE COURT: 10 is admitted.

(State's Exhibit No. 10 received in evidence.)

Q. (BY MR. LAROSA) The -- is there any discussion that took place on the Facebook page of Ronnie Fisher that you saw on April 26th discussing the photograph of the two individuals standing over the dead elk?

A. Yes.

Q. All right. And is that discussion contained in -- in that State's Exhibit 10?

[160] A. Yes.

Q. All right. And who does this discussion take place between?

A. Jerry Purdue Rizzo and Ronnie Fisher.

Q. And what does Jerry -- who asked the question?

A. Ronnie posted a picture of him with the first bull. Jerry asked him, "Nice, where did you get him at?" Ronnie Fisher replied, "No tell 'em ridge. Haha."

MR. LAROSA: Permission to publish, Your Honor.

THE COURT: You may publish. Can I please have that back? I'm sorry. I'm not quite done.

Q. (BY MR. LAROSA) The -- the -- there's something -- how many pics are actually Facebook (unintelligible)?

A. There's three pictures.

Q. All right. And how many of them did you actually see at the Monster Muleys thing?

A. Just one.

Q. All right. Is there anything about those other two photos that you noticed?

A. There -- the pictures of Ronnie posing with this bull are not -- they're not the bull that he -- that Clayvin had claimed he killed in Monster Muleys. It's a [161] different elk.

Q. The -- let me see. Make sure I know what you're talking about. Let's go -- State's Exhibit 10 has two pages, right?

A. Correct.

Q. First page is the page that you found at Monster Muleys of Ronnie Fisher, DL Singer over a dead elk, correct?

A. Correct.

Q. On the next page you see that photo again, but it's smaller, correct?

A. Correct.

Q. And the photo underneath that is something you had not previously seen, is it?

A. No.

Q. All right. Is there anything that you recognized in that photo?

A. Yeah. I recognize it as being the same elk that Clayvin Herrera was posing with that he posted on Monster Muleys.

MR. LAROSA: Can I have State's Exhibit 8 back, please? (Unintelligible.)

Q. (BY MR. LAROSA) What do you see?

A. Well --

Q. Looking at -- let me hold this up, please.

[162] A. Okay.

Q. Try to explain the difference.

A. Okay. So looking at these two bulls, obviously you can see on the left side of this bull, one of his -- they call them eye guards, his second point coming out, it's kind of stumpy, it's not real long. So in the photograph it tends to disappear. Well, in this photograph it also tends to disappear. But if you notice, there's a rifle leaning against this tree, it's the same rifle that's leaning against this tree. And just looking at the trees and the position of the elk and the rifle, I assumed it was the same location, the same elk.

Q. All right. Is there anything about -- other than the rifle, does the site appear in any way similar to anything you saw previously?

A. Yeah. It's -- you know, it's the same burned-out trees. There's -- you can't really see it very well. There's a burned-out knot at the base of this tree you can see in both photographs. Just the -- I guess the distance, because it -- being that it's burned, there's some trees behind it that didn't burn. It seems the relative distance between this bull and the burned-out trees that weren't burnt is about the same in both photographs.

Q. Okay. Let's go to State's Exhibit 11 now. What [163] did I do with that? (Unintelligible.)

MS. GRAY: (Unintelligible).

MR. LAROSA: That's what's above it.

MS. GRAY: (Unintelligible) substitute these.

MR. LAROSA: Okay. That would be fine.

Q. (BY MR. LAROSA) What's State's Exhibit 11?

A. State's Exhibit 11 is a photograph and some comments that I downloaded off of DL Singer's Facebook page -- or copied and pasted off of DL Singer's Facebook page.

Q. All right. And when you looked at that -- and does it -- does the State's Exhibit 11 accurately show what you saw -- when did you go to that -- is that also on April 26?

A. That was also on April 26th.

Q. Does it show, essentially, what you saw on the page on that occasion?

A. Yes.

Q. All right. And the discussion -- does it contain discussions that occurred, likewise, when you saw it on April 26th?

A. Yes.

Q. All right. Did you see anything in there that you recognized?

[164] A. Excuse me?

Q. Did you see anything in this -- in State's Exhibit 10 that you saw the Facebook posting of DL Singer that you had previously seen?

A. Yes. This was the same photograph that I saw on Monster Muleys.

MR. LAROSA: All right. And State would move the admission of State's Exhibit 11.

THE COURT: Any objection?

MS. GRAY: No objection, Your Honor.

Q. (BY MR. LAROSA) The --

THE COURT: 11's admitted.

(State's Exhibit No. 11 received in evidence.)

Q. (BY MR. LAROSA) And, likewise, is there any discussion -- Facebook posts that are taking place on that day?

A. Yes.

Q. All right. And are they a post by DL Singer?

A. Yes.

Q. Does anybody ask DL Singer in a post underneath the photograph of -- of Ronnie Fisher and DL Singer standing over that elk?

A. Yes.

Q. And what is that conversation?

[165] A. Abrami Half said, "Nice. Where did you get it?" And DL Singer said, "Don't tell ridge. Laugh out loud."

Q. And what date and time does that conversation happen?

A. It was on January 18, 2014 at 7:10 and 7:14 p.m.

Q. And I forgot to ask you. The same conversation that took place in State's Exhibit 10 with Ronnie Fisher, what's the date and time of that conversation?

A. That was on January 18th at 5:23 p.m.

Q. All right. Are you familiar with a "don't tell ridge"?

A. No.

Q. Are you familiar with a "no tell 'em ridge"?

A. I should say I am in the fact that when hunters normally don't want people knowing about an area

where they were hunting, they call them "don't tell creek," "don't tell ridge," et cetera, so...

Q. Okay.

MR. LAROSA: Permission to publish, Your Honor?

THE COURT: You may publish.

Q. (BY MR. LAROSA) Okay. What happens after you see all -- did you likewise, with DL Singer, did you preserve -- you downloaded that and preserved it?

A. Yes.

[166] Q. What happens after you have all this information?

A. Well, I kind of had a hunch -- just based on the limited topography and vegetation I could see from the photographs, I kind of had a hunch where it was at, but I wanted to confer with some people who knew the area a lot better than I did.

Q. All right. Which is -- the Monster Muleys photos, is there one that -- in particular that shows the greatest expanse of terrain that might give you some idea as to where it is?

A. Yeah. The picture of Colton Herrera's essentially what I used, but --

Q. Okay. Who is Glenn Sheeley?

A. Glenn Sheeley is a business owner in Dayton. He's a big outdoorsman. He likes to antler hunt. He likes to hunt elk. He has a bear bait. He's an avid outdoorsman.

Q. Okay. And was -- had he reported any of the incidents of poaching that occurred in Hunt Area 38?

A. Yes. He reported 12, I believe.

Q. Did you have occasion to meet with him during the course of this investigation?

A. Yes. In May I took -- I took this photograph to him. And I just -- I just asked him where he thought it [167] might be.

Q. Did he have an idea where it might be?

A. He did.

Q. Where was that?

A. He believed that it was somewhere around the Marble Quarry Road, up -- I guess being up -- up the mountain from what they call the Upper Tank.

Q. All right. When he told you where he thought it was, were you familiar with that area yourself?

A. Yes. I --

Q. Where it was, what --

A. Yes. I believed that's where it was. So it kind of confirmed my suspicion.

Q. All right. What hunt area is that in?

A. That's in 38.

Q. All right. And is Hunt Area 38 in Sheridan County?

A. It is.

Q. Okay. And this is on May 16th. What do you do after your hunch as to where that photo may have been taken is confirmed?

A. Glenn actually told me of four other carcasses he had found while he was antler hunting in the same general vicinity. So investigator Scott Adell and I went

to look at those. And we had kind of made the plan when [168] we were finished looking at those carcass -- carcasses, we were going to hike around and see if we could find where this location is at.

Q. Who is Scott Adell?

A. Scott Adell is a wildlife investigator for the Game & Fish here in Sheridan.

Q. All right. And did he agree to accompany you?

A. He did.

Q. And what date did that occur on?

A. That was on May 19, I believe.

Q. All right. And what type of equipment did you bring with you to the field?

A. I brought my camera. I always bring a -- like a ruler to measure with. I brought my GPS. I brought this photograph -- I brought all the photographs with me.

Q. All the Monster Muleys photographs?

A. All the Monster Muleys photographs with me.

Q. Okay. Did you bring anything that would assist you in the collection of evidence, biological evidence?

A. Yes. I brought seizure tags. I brought my DNA kit. You know, just some bagging that I could package --if I found anything, I could package and preserve evidence.

Q. All right. Were you able to find any of the sites that are portrayed in the photos of Clayvin Herrera, [169] Ronnie and DL [sic] Fisher and Colton Herrera, Jr. in the photographs that you originally found at the Monster Muleys forum?

A. Yes.

Q. How many of them were you able to find?

A. All of them.

Q. Did you find all of the sites that day?

A. I found all the sites that day.

Q. The -- are all of those sites in Hunt Area 38?

A. Yes.

Q. What was their proximity to each other?

A. They were on a hillside. All of them probably would have fit on a football field -- you know, all within a football field.

Q. All right. What's the name of the location where you found these sites?

A. Where they were at, it's essentially just the ridge above Eskimo Creek.

Q. Is the -- is there a state line fence in that general location?

A. Yes.

Q. All right. And how far away from that fence are these sites?

A. It's a mile.

Q. Were you able to find any remains at any of [170] these sites that date?

A. Yes.

Q. And how many of the sites were you able to find remains?

A. We found remains at the site where Clayvin was kneeling next to the mature bull elk. Oops. Sorry.

We were able to find remains at the site where Ronnie and DL were shaking hands. We found a fourth bull that had been untouched. But the -- the bull that we suspected Colton having killed, we couldn't find it tnat day.

Q. All right. Were you subsequently able to find remains in the vicinity of that site?

A. Yes.

Q. When did that occur?

A. That was June 2nd.

Q. Okay. The -- and did you photograph -- can you please explain to the jury how -- how did you actually find the sites? A. So this -- this picture right here, essentially hiking up the ridge -- I mean it was essentially just -- I continued hiking for, I don't know, two or three hours, trying to match the topography as best I could to this picture. Ironically enough, when I started walking in the berm -- right when I kind of thought I had hit the [171] jackpot, I looked down and there was an elk pelvis and spinal column laying on ground with what I call a rumen ball. If an elk or deer or antelope, if their rumen freezes, it turns into like this hard mass that doesn't really disintegrate because it's just grass. Like a big smashed grass ball. That was laying there with the -- the pelvic bone and the spinal column essentially laying right in it. So I inadvertently, which -- I walked right to it.

Q. The -- all right. And what was it -- just one moment, please.

I'm now showing you what is labeled as State's Exhibit 12.

MS. GRAY: Your Honor, may I voir dire the witness for a moment on this? I just want to find out who produced --

MR. LAROSA: I think if I get some leeway, I can establish very --

THE COURT: All right.

MR. LAROSA: -- the construction of the --

THE COURT: Okay.

MR. LAROSA: -- of the piece of evidence.

THE COURT: Please do.

Q. (BY MR. LAROSA) When you're at the sites that day, did you document what you found by taking photographs of the sites?

[172] A. I did.

Q. All right. And did you save those photographs?

A. I did.

Q. Did you do anything to the photographs at any later date to sort of identify the things that you saw in the site photograph that you saw bore on whether it was the same site from the photograph you found at Monster Muleys?

A. I did. At the scene, comparing the photograph to Monster Muleys, I tried to take photographs that I thought would best match the scene. I later went home and put red arrows kind of identifying unique, you know, curvature of a tree or a chunk of bark or the way a tree was laying on another tree that was very unique. I compared the photographs on Monster Muleys and the photographs I had taken.

Q. Okay. And did you also photograph the remains?

A. I did.

Q. All right. And when you -- when you -- did you see the -- did you inspect the remains when you found the remains that you found at the site that matched the photos of Clayvin Herrera at Monster Muleys?

A. I did.

Q. Did you observe anything when you inspected those remains?

[173] A. Looking at the remains, like holding them in my hands and visually looking at them, I knew from one of the photographs that he had cut off the back straps of this elk. So looking along the spinal processes of this elk, you can see knife marks or tool impressions in the bone, indicating someone had cut meat from the bone of that animal.

Q. All right. Let's go through the State's exhibit. And do you believe that State's exhibit -- what are the first two pages of State's Exhibit 11? 12, rather. I'm sorry.

A. Page 1 is a picture I recovered off of Monster Muleys with Clayvin posing with the back strap and the bull elk head.

Page 2 is a comparison photo I took where I believed the photograph -- or essentially where I believed Clayvin Herrera was standing when that photograph of him was taken.

Q. You're in the photograph. So who actually took the photograph?

A. Scott Adell took that photograph.

Q. The -- the -- and if -- it's set out so that one can look at both of them simultaneously, are they not?

A. Yeah.

Q. And could the jury, in looking at -- please [174] don't show it to the jury.

A. Oh.

Q. In examining pages 1 and 2, could the jury discern the characteristics that you saw when you were at that site on May 19th?

A. Yes.

Q. All right. What are pages 3 and 4?

A. Page 3, that is a picture of Clayvin Herrera that I downloaded off Monster Muleys with arrows that I had put on the pictures identifying unique characteristics of the background.

Q. All right. And looking at pages 3 and 4 with the arrows attached, does that make -- would that make it useful for the jury to see the characteristics that you in particular saw when you were at that site?

A. Yes.

Q. And what's on page 5 and 6?

A. Page 5 and 6 -- page 5 is a picture that I downloaded of Clayvin Herrera kneeling next to the bull elk. Page 6 is the -- the pelvis and spinal column and the rumen material as I found them on May 19th.

Q. In looking at these two photos contemporaneously, do you see -- is it -- does it show kind of the -- can you see the characteristics that led you to believe that you had found the site?

[175] A. Yes.

Q. What are pages 7 and 8?

A. Pages 7 and 8 -- page 7 is that same photograph of Clayvin kneeling next to the bull elk with arrows kind of pointing out unique features of the topography and vegetation. And page 8 is a picture I took with those same arrows pointing out the same unique features.

Q. And looking at (unintelligible) would it allow the jury to see the characteristics that in particular you saw that helped you identify the site as the right site?

A. Yes.

Q. And what were pages 9 and 10.

A. Page 9 is the pelvis and spinal column as I found it, undisturbed. Page 10 is a close-up of tool marks on one of the spinal processes.

Q. And what is page 11?

A. Page 11 is another photograph of tool marks on a different spinal column.

MR. LAROSA: State would move the admission of State's Exhibit 12.

THE COURT: Any objection on 12?

MS. GRAY: No objection, Your Honor.

THE COURT: All right. 12 is admitted.

(State's Exhibit No. 12 received in evidence.)

[176] Q. (BY MR. LAROSA) And why don't I try -- try to change it, rather than publish it. Do you think you can hold it up and just point to the photo with the arrows at least and show the jury what it was you saw that led you to believe you had found the place.

A. Okay. So here's the picture of Clayvin holding his bull. There is an old kind of burned-up stumpy tree here that kind of went to a point. There was a -- kind of a crook in a tree up here that was kind of odd. There was a tree that was leaning in front of a pine tree -- a burnt tree leaning in front of a pine tree that didn't burn. And then there was kind of a unique piece of bark. When I went back to the kill site -- or when I found the kill site, I could find the same unique burnt tree, the unique crook in the tree, the unique bark, as well as the unique leaning burned tree in front of the unburned tree.

Q. All right. And can you identify -- show the jury the photo of the remains that you found. Actually, and there's two set of arrow comparisons. Can you go to the second one and do that likewise, please.

A. Yeah. So here's the photograph of Clayvin with the bull off Monster Muleys. There's kind of a goofyshaped tree that's got three different branches kind of coming off the bottom. There's kind of some leaning trees that lean in a weird kind of angle. They make like two [177] Xs. There's a burned-out knot at the top of this tree, and there's a very distinct burned-out knot at the bottom of this tree. And at the kill site we found the exact burn on the bottom of the tree. Here's the three -- the tree with three different branches coming out of it. There's kind of unique crossing of the two different ones falling down. There's the knot that corresponds to this. As you can see, there's actually the pelvic bone and here's the rumen contents from that.

Q. Is there a close-up photo of the remains that you took?

A. Yes.

Q. Please just show that to the jury. And can you show the jury in any of the close-up photos of the remains where you observed tool marks.

A. Yeah. If you look -- being that he cut the back strap off, he'd be cutting straight down on the animal. Essentially, if you can imagine, this is essentially like a dorsal order of a process coming off the side of the spinal column where they have the -- standing upright, you can see where the knife mark came across the back of the -- on both these photographs, indicating that they had used a knife to cut the meat off.

Q. Thank you very much.

The -- what site did you find first?

[178] A. That one.

Q. All right. The -- how soon thereafter were you able to find the other sites? You've testified they were all found within a football field of each other.

A. Fifteen minutes.

Q. The -- okay. Show you State's Exhibit 13. Will you please take a moment and examine that. And who put these exhibits together, by the way?

A. I did.

Q. Thank you. The -- what is State's Exhibit 13?

A. State's Exhibit 13 is photo comparisons between the picture of DL Singer and Ronnie Fisher with Ronnie's bull and the background comparison when we actually hiked into the area.

Q. That's the Monster Muleys photo?

A. That's correct. The Monster Muleys photo.

Q. All right. What's photo number 2?

A. Photo number 2 is based on the -- it's the topographical and vegetative features, what we figured to be the spot where Ronnie had killed his bull.

Q. What are pages 3 and 4?

A. Pages 3 and 4 are kind of comparison photos of the picture of Ronnie and DL from Monster Muleys in the picture I took with arrows highlighting specific features of -- that are similar in both photographs.

[179] Q. And these are all features you noticed in the field?

A. Yes.

Q. What are photos 5 and 6?

A. Photo number 5 is the spinal column with some ribs, as well as the -- the pelvic bone of a bull elk that was actually, I don't know, four -- four yards from this spot where I took the photograph -- the comparison photograph.

And 6 is close-up picture of tool marks on -- along the spine -- the spinal bone of an elk that I took from that carcass.

Q. These photos accurately display what you found at that site on May 19th?

A. Yes.

MR. LAROSA: State would move the admission of State's Exhibit 13.

MS. GRAY: No objection, Your Honor.

THE COURT: 13's admitted.

(State's Exhibit No. 13 received in evidence.)

Q. (BY MR. LAROSA) And if you can just go to the pages 3 and 4, the arrow photos, and hold them up to the jury, and just, if you could, please, take a moment to explain what it was that you saw that led you to believe [180] that you had found the site where the Monster Muleys photograph of Ronnie Fisher and DL Singer standing over a dead elk was taken.

A. In the picture from Monster Muleys, I could tell it was kind of toward the top of a hillside, just because there wasn't any trees or anything behind it. So walking, would have been southwest, just a little ways from where we found Clayvin's bull, I noticed this bare tree here. And when I started looking at it closely, I could see some of the bark had fallen off it, but this bark piece and that bark piece still remained. There was kind of a little like zigzag in the bark. Upon this picture, we were able to find that piece of bark essentially next to this one. And then you can see there's kind of an odd branch and kind of a bare spot in a tree. We were able to discover the odd branch and the bare spot from that spot.

Q. All right. Can you show the photos of the remains and where you observed the tool marks -- identify the remains and where you saw the tool marks when you examined those remains up closely.

A. So from where I took the comparison photograph, if I would have turned around and looked on the ground, essentially this is what I found, the spinal column and pelvis of an elk. When I took a hard look at it, you could see knife marks or tool marks on the vertebra.

[181] Q. Okay. Thank you.

The -- State's Exhibit 14. Please take a minute to go through that and then tell me what that is. Tell me if you recognize it.

A. Yes. This is, essentially, the picture of Colton, Jr. holding that elk head from Monster Muleys, and then comparison photograph from where we believed he was standing when this photograph was taken.

Q. All right. And those are photographs either you or Scott Adell took in the field, the second photograph?

A. Yes.

Q. And what happened -- what happened -- what -- what are -- what are -- those are photographs 1 and 2. What are photographs 3 and 4?

A. Photographs 3 and 4 are just the photograph of Colton, Jr. with the bull elk head with arrows kind of identifying unique characteristics. Page 4 is the photograph that I took with arrows, indicating those same unique characteristics.

Q. The -- what are photographs 5, 6 and 7?

A. Photographs 5, 6 and 7, when we -- we couldn't find -- just due to the deep snow, we couldn't find where that elk had been -- we couldn't determine where that elk carcass was at. We kind of had an idea just based on the topography, but it was probably under a snowbank. So I [182] waited until June 2nd and hiked back into the area and was able to find a carcass, oh, within 60 yards of where that photograph was taken of --

Q. And can you see what you found on June 2nd in photographs 5 and 6?

A. Yeah. It's the spine and pelvis and some ribs.

Q. And what's the photograph in -- in State's Exhibit 7?

A. On 7, on one of the ribs, I could see tool marks indicating that a tool had been used -- you know, a knife, more than likely -- on the ribs.

MR. LAROSA: All right. State would move the admission of State's Exhibit 14.

MS. GRAY: No objection.

THE COURT: 14's admitted.

(State's Exhibit No. 14 received in evidence.)

Q. (BY MR. LAROSA) All right. And could you go to pages 3 and 4, the ones with the arrows -- they're like 1 and 2, except with the arrows. Hold that up for the jury and just run through what it was, while they can see -- see it to some degree, at least -- and what it was that led you to believe that you had found that site.

A. This was essentially the photograph that -- that led me to find the site where these elk were killed. [183] Looking back at the topography, you can kind of see the end of a kind of a bald ridge. The end of the bald ridge is right here in this photograph. It kind of flattens out, and another kind of bald strip starts in the background where you can see on this hill. It's the same, I guess, hillside from -- from both photographs.

I added arrows to show there's kind of a stumpy black burned-out limb on this tree right here. The same stumpy black limb is on this tree. This tree's kind of got some weird -- the bark fell off. It kind of left a unique design on this tree right here. You can see that it's the same tree.

This is kind of a unique fork in the tree. There's the same unique fork. This is kind of a weirdlooking burned-out tree that kind of comes up and splits. And this photograph you can see it comes up and splits.

Q. All right. Thank you.

The -- what do you do when -- what -- the remains that you found, I understand that last remains was found on June 2nd. The others on May 19. When -- what do you do when you seize that evidence?

A. First thing I did was set my GPS down where the remains were found and took a waypoint on my GPS. They were also photographed.

[184] Q. Why do you do that?

A. We do that so you can determine its location.

Q. Okay.

A. So we GPS'd them. We photographed them. They were collected. And each individual item that was collected at the scene was assigned a seizure tag specific to that item.

Q. All right. That item number is on the tag itself?

A. That's correct.

Q. What other information did you put on that tag?

A. On the tag itself, I write the time and date that it was collected, the case number, and then I write down where it was found at, which is the UTM recording from my GPS, as well as kind of a basic kind of generic Eskimo Creek. Below that I write down in the description exactly what it was that I collected, and then I sign my name to it.

Q. All right. Did you do it -- so how many -- how many separate remains were in total collected from the three sites?

A. Three.

Q. Okay. The -- and they each were given a unique number?

A. Yes.

Q. All right. And you preserved the location of [185] each?

A. Yes.

Q. The -- okay.

THE COURT: Counsel, I think this might be a good time for us to just take a few-minutes break. It's --

MR. LAROSA: That would be great.

THE COURT: Let's do that. Let's take a -- about a 15 -- well, we'll be back -- try to be back in here by 3:15. But we'll take a break.

All right. The jury's out so we'll be in recess until about 3:15.

(Recorded trial proceedings recessed
2:59 p.m. to 3:16 p.m.)

THE COURT: Bring the jury in, please.

All right. The jury is back. Everybody please be seated.

And we'll resume the testimony of Warden Shorma.

And you are still under oath.

Q. (BY MR. LAROSA) Okay. Where we left off, Warden, you basically said you took the time to

identify and preserve the GPS coordinates for location purposes of the three remains; is that correct?

A. That's correct.

Q. The -- and you're doing this when you're [186] standing out there at those locations, correct?

A. That's correct.

Q. All right. The -- and how far away -- and -- and as the crow flies, how far away is this location from the state line?

MS. GRAY: Your Honor, I object. Lack of foundation.

MR. LAROSA: I can lay some foundation.

THE COURT: Sustained.

Q. (BY MR. LAROSA) In this vicinity -- have you spent time in this vicinity?

A. Yes.

Q. All right. And the -- is there a road anywhere in this vicinity?

A. There is. The Marble Quarry Road.

Q. All right. And how, basically, close -- and does the road cross onto the Crow Reservation?

A. Yes.

Q. The -- and is there a fence in that location --

A. Yes.

Q. -- leading -- and does the road run north-south?

A. The road runs more southwest to northeast.

Q. Okay. And if you follow that road from the Crow Reservation and you come into Wyoming, the --

the -- how close do you actually get to the site where these kills [187] happen?

A. Oh, it's about a mile.

Q. Via -- all right. And the -- is there a fence in this vicinity?

A. Yes.

Q. The -- and running -- and is there any interruption in the fence in this vicinity of Hunt Area 38 --

MS. GRAY: Your Honor.

Q. (BY MR. LAROSA) -- other than the gap in the Marble Quarry Road?

MS. GRAY: I'm going to object to the leading nature of these questions.

THE COURT: I'm going to overrule for basis as a foundation.

MS. GRAY: I'm sorry. Could I have that last question -- is it possible to have the questions read back?

THE COURT: No. We'll just have to have him --

Q. (BY MR. LAROSA) Is there any -- where the Marble Quarry Road is, is there -- is there a fence running in both directions away from the road?

A. Yes.

Q. All right. And is that fence interrupted in [188] that -- in -- in say that mile -- in a mile area, anywhere other than where that road is?

A. No.

Q. Okay. The -- and what else -- and can you, from the sites where you believe you found where those photos were taken, can you see that fence?

A. No.

Q. All right. In the course of this investigation, did you walk that fence line?

A. Yes.

Q. All right. And did you -- is there anyplace along that fence line where you can kind of see the ridge above -- the area that you have described on sites that you found, which is the ridge above Eskimo Creek?

A. Yes.

Q. Did you take a photograph of the perspective one has standing at that location?

A. I did.

Q. All right. And does that give just any kind of sense of just kind of how far away it is from the fence?

A. It does.

Q. I'll show you State's Exhibit 15. You know what I'm showing you?

A. Yes.

Q. All right. What is that?

[189] A. It's a picture looking south from the fence on the state line.

MS. GRAY: Excuse me. Is that 15 or 16?

MR. LAROSA: That would be 15.

THE COURT: 15.

MS. GRAY: Do I have them out of order?

MR. LAROSA: You do have them out of order. That's 15.

Q. (BY MR. LAROSA) All right. I'm now going to show you State's Number 16.

MR. LAROSA: I move the admission of State's Number 15 at this time.

THE COURT: Any objections?

MS. GRAY: Your Honor, (unintelligible)?

THE COURT: Yes.

MS. GRAY: No objection, Your Honor.

THE COURT: Okay.

Q. (BY MR. LAROSA) Can you just hold it up to the jury. Give them a sense of basically where the ridge above Eskimo Creek is in that photo.

A. This is -- oops. So this is from the state line. This would be looking north. This drainage over here is Eskimo Creek. This is ridge above Eskimo Creek where the carcasses were located. I don't know if you can see it, but there's kind of a light spot in the [190] trees. That's -- it's burnt trees that you're looking at there. That would have been where the elk carcasses were located.

THE COURT: And, by the way, 15 is admitted.

(State's Exhibit No. 15 received in evidence.)

Q. (BY MR. LAROSA) All right. And you have Exhibit 16 in front of you now.

A. Yes.

Q. Do you recognize what that is?

A. Yes.

Q. And did you take that photo yourself?

A. Yes.

Q. All right. And what is -- what does that photo show?

A. That is a picture from the Marble Quarry Road showing the fence on the state line from Montana looking towards Wyoming.

MS. GRAY: And I object, Your Honor. There's been no foundation laid to show that is the state line. Just no foundation laid to show what the fence marks.

THE COURT: All right. I'll sustain that just so we can lay some foundation.

[191] Q. (BY MR. LAROSA) All right. The -- you said you've been a warden for 18 years.

A. Yes.

Q. And you've been -- you spend time in the field, correct?

A. Yes.

Q. In the time that you've done that, have you become familiar with border markings?

A. Yes.

Q. All right. What are border markings?

A. Border markings are essentially posts that are put out by the National Geodetic Survey, or the USGS, that essentially identify boundaries.

Q. All right. And can you recognize a boundary marker when you see one?

A. Yes.

Q. All right. And what kind of shape do they usually take?

A. They're circular with a brass cap. They stamp numbers in, identifying essentially what you're looking at.

Q. All right. And if the boundary is the state line, what kind of information's on that boundary to indicate that what's being marked is a state line -- state border demarcation?

[192] A. Depending on how the state line goes through the marker, it will stamp the initials of each state on that side of the marker.

Q. Okay. And -- and -- all right. At the gap in the fence of the Marble Quarry Road, is there a border marker?

A. Yes.

Q. Can you see it in that photograph?

A. Yes.

Q. All right. And what does that bound -- what does that border marker mark?

A. It essentially marks the boundary of the Bighorn National Forest and the Wyoming-Montana state line.

Q. All right.

MS. GRAY: And I'm going to object again to lack of foundation for -- may I ask -- may I voir dire this witness?

THE COURT: Um, as to?

MS. GRAY: As to the border marker and when they put the fence up and what does Mr. Shorma know about it.

THE COURT: All right. I will allow a limited voir dire on that.

VOIR DIRE EXAMINATION

Q. (BY MS. GRAY) Good afternoon, Warden Shorma.

[193] So can you tell me (unintelligible)?

A. It's that post. That's correct.

Q. Okay.

THE COURT: All right. That was quick. All right. Thank you.

MS. GRAY: No, no. I want to ask some questions, but I just don't want to stand next to him.

THE COURT: You're still going? Okay.

Q. (BY MS. GRAY) So, Mr. Shorma, there's a -- in the photo there's a post that says Wyoming state line. It's not in the same place as the fence; is that correct?

A. That's correct.

Q. Do you know who put that fence up -- that sign up?

A. The Wyoming state line signs?

Q. Yes.

A. I did.

Q. You put it up?

A. I did.

Q. You put it behind the fence?

A. I put it on the Wyoming side of the fence.

Q. Okay. So how about the fence? Do you know who put the fence up?

A. The fence is maintained by the permittee that has that grazing permit.

[194] Q. Okay. Let's -- let's back up first. I didn't ask who maintains it. Who put it up originally?

A. I don't know.

Q. And a permittee for whom?

A. As far as --

Q. Well, you said it was maintained by the permittee.

A. Oh, the grazing permittee on the forest. That and the landowner who maintains the fence.

Q. Okay. So if I'm understanding you correctly, this land here where you put up -- this -- this sign that says Wyoming, that's in the Bighorn National Forest, correct?

A. That's correct.

Q. Okay. And who is the owner of the Bighorn National Forest?

A. Everybody.

Q. All right. Let's take that back a little bit. Who is the owner in fee simple of the land that is the United States forest with the name Bighorn National Forest?

A. I guess it to be the citizens of the United States.

Q. Is it the United States -- is it the United States Forest Service?

[195] A. The Forest Service manages it, yes.

Q. Okay. And so do you -- well, let me ask this question this way. Do you have any training in surveying?

A. No.

Q. Do you have any training in the law?

A. No.

Q. Do you know how the United States government owns government facilities?

A. No.

Q. Do you know -- do you have any training in how grazing permits are let or acquired?

A. Some.

Q. Okay. Under Wyoming or federal law?

A. Be federal.

Q. Okay. And is a -- a -- to your understanding, is a person who has a grazing permit a federal employee?

A. No.

THE COURT: All right. I think we're getting outside the scope of --

MS. GRAY: Let me -- let me finish one more thing.

Q. (BY MS. GRAY) So do you know who put up this fence?

MR. LAROSA: Objection. Asked and answered.

[196] MS. GRAY: You're probably right.

THE COURT: Sustained.

MS. GRAY: Okay. I'm going to renew my foundation objection, Your Honor. I don't think Mr. Shorma has been able to identify that the fence, what it marks, who put it up, and whether who put it up had authority to put it up.

THE COURT: All right. Your objection is sustained -- overruled. I'm sorry.

You may proceed, Mr. LaRosa.

DIRECT EXAMINATION (CONTINUED)

Q. (BY MR. LAROSA) What state is the Bighorn National Forest in?

A. Wyoming.

Q. I'll show you State's Exhibit 17. You said that there's a marker at the -- demarcating the boundary between Montana and Wyoming at the fence -- at the gap in the Marble Quarry Road. Do you recognize what State's Exhibit 17 is?

A. Yes.

Q. What is that?

A. It is the boundary marker at the top of that cap.

Q. All right. And is it -- does the photograph lead the -- are the -- is what's written on the top of

[197] that marker legible?

A. Yes.

Q. All right. And does it make clear which side of the pin is Montana and which side is Wyoming?

A. Yes.

MR. LAROSA: All right. And the State would move the admission of Exhibits 15, 16 and 17 at this time.

MS. GRAY: Which numbers?

MR. LAROSA: 15, 16, 17.

MS. GRAY: We had no objection to 15.

We object to 16, Your Honor, on the grounds there's been no foundation laid that this marking, as it appears the road has anything to do with the incident. There's been no testimony given that the --

Mr. Herrera or any of the other alleged hunters were anywhere near this road.

THE COURT: Mr. LaRosa?

MR. LAROSA: The evidence so far has indicated the testimony of the three sites where remains were found were a mile from the border of Wyoming. And these exhibits establish a location of the border in the vicinity.

THE COURT: All right. Your objection is overruled, and 16 is admitted.

[198] (State's Exhibit No. 16 received in evidence.)

THE COURT: What about 17?

MS. GRAY: I just want to make sure I have them in order. Is this 17 is this one?

MR. LAROSA: Yes. 16. 17.

MS. GRAY: 17. Okay. No objection to 17, Your Honor.

THE COURT: All right. 17 is admitted.

(State's Exhibit No. 17 received in evidence.)

MS. GRAY: This is 15?

MR. LAROSA: I haven't done that yet.

MS. GRAY: Oh. This one. Well, we did not object to 15. We do not object to --

THE COURT: 17.

MS. GRAY: -- 17. We do not object to this one here. Is that --

MR. LAROSA: I haven't showed that one.

MS. GRAY: You haven't showed that one yet. Okay.

We continue our objection to 16.

THE COURT: All right. Over your objection I am admitting 16. So 15, 16 and 17 are admitted.

Q. (BY MR. LAROSA) Could you please show State's [199] Exhibit 16 to the jury so they can see the Marble Quarry Road and the fence to that location.

And can you further identify where the boundary marker is in that photograph?

A. Boundary marker's right here next to the brace.

Q. How removed from the fence is the location from that boundary marker?

A. It's directly underneath the brace.

Q. Okay. Can you please hold up State's Exhibit 17 and show the jury what the top of that boundary marker looks like.

Can you identify where it says Wyoming and where it says Montana?

A. Yes. Up at the top here, this is looking directly down on it. The side where it says Montana, the side south says Wyoming.

Q. Okay. And what is the forest preserve? Do you know is that a -- did that -- how many boundary markers do you believe you see in the course of being a game warden?

A. Probably --

Q. Is that a new one or an old one?

A. This is an old one.

Q. Okay. If you are -- you said the road runs southwest, correct?

A. Correct.

[200] Q. So if you run in a -- in a westerly direction along the fence line, do you encounter any other boundary markers?

A. Yes.

Q. What do you encounter and how far removed?

A. From the gate here on the Marble Quarry Road west is probably 250, 300 yards.

Q. All right. And what do you find at that -- what do you find 250 to 300 yards away along the fence line?

A. There's another stamped brass cap that has Montana and Wyoming stamped on it, and there's also a yellow Carsonite post that indicates you're entering Bighorn National Forest.

Q. All right. Now I'm going to show you Exhibits 18 and 19. Let's deal with them in turn. What is State's Exhibit 18?

A. 18 is a picture I took looking west of the Carsonite post indicating the Bighorn National Forest boundary.

Q. Okay. And can you see the boundary marker in that photograph?

A. Yes.

Q. All right. And where is it located with respect to the fence line?

A. It's located directly underneath it.

[201] Q. All right. And what's State's Exhibit 19?

A. 19 is the brass cap at that location.

Q. And does that brass cap likewise demarcate the boundary between Montana and Wyoming?

A. Yes.

Q. And can you see that in that photograph?

A. Yes.

MR. LAROSA: The State would move the admission of State's Exhibit 18 and 19.

THE COURT: Any objection to 18 and 19?

MS. GRAY: The same objection, Your Honor, we had to the last set. We don't think there's foundation laid to -- particularly for the fence. Not so concerned about marking the Bighorn National Forest. So it's more the -- I guess, I'm going to object to 19.

THE COURT: All right. Any response, Mr. LaRosa?

MR. LAROSA: State's Exhibit 19 clearly indicates upon inspection that it's a boundary marker between the two states. The two states being Montana and Wyoming.

THE COURT: All right. The objections are overruled, and 18 and 19 are admitted.

(State's Exhibit Nos. 18 and 19 received in evidence.)

[202] Q. (BY MR. LAROSA) Could you please display Exhibit 18 to the jury and identify what's in the photo.

A. So this is along the fence line looking -- looking west. You can see there's a Carsonite post right here that when you look at it from the Montana side, essentially it says Bighorn National Forest on it. At the very bottom of it, down here in the rocks, there's a brass cap.

Q. All right. Could you show -- display Exhibit 19 for the jury and describe what is on -- what's photographed.

A. So this is the brass cap that's underneath the fence. You can see Wyoming written on one side, Montana written on the other. I'm not quite sure what these numbers mean, but they generally stamp the year it was surveyed on the cap. In this you can see it's '95, right here.

Q. And are these two respective boundary pins that

you see in two locations, are they of a form and type that you have encountered in other location -- other boundary locations?

A. Yes.

Q. The -- is the fence between those two boundary markers uninterrupted?

A. Yes.

[203] Q. How many -- how many points does it take to make a line?

MS. GRAY: Let me object to that. I'm -- uninterrupted for a given length? I'm not certain what that question asks. So I'm going to object as to foundation. I'm not sure what it asks.

THE COURT: All right. Either rephrase the question or lay some foundation, please.

Q. (BY MR. LAROSA) Other than the gap for the Marble Quarry Road, continuing west from there, is there any gap in the fence until you get to the pin in State's Exhibits 18 and 19?

A. No.

Q. Okay. How many points does it take to make a line?

A. Two.

Q. And doing what you do to enforce the laws of Wyoming -- Game & Fish laws of Wyoming as the warden, what do you believe that fence line to be?

A. The state line.

Q. And is that based on the markings?

A. Yes.

Q. Is that based on maps that you've seen?

A. Yes.

Q. Okay. You stated that when you're out in the [204] field on May 19th, and I guess on June 2nd also, you preserved, using GPS technology, the coordinates identified and the location of the remains that you found; is that correct?

A. Yes.

Q. All right. What is Global Positioning -- what does GPS stand for?

A. Global Positioning System.

Q. And what type of GPS equipment did you bring with you to the field?

A. I have two different GPSes that I use. That day I took a Garmin I believe it's a 60CSx.

Q. All right. And why do you use GPS technology to do the job that, do you?

A. Because I -- it's -- it's accurate and I can accurately describe crime scenes with it. I can use it to identify locations of animal species in the county. Settle disputes between --

MS. GRAY: Your Honor, if I could be heard for a moment. So I'm going to object. Mr. Shorma was not identified as an expert and he's now delving into discussions of the accuracy of a particular technology. And we had no notice that (unintelligible) noticed within the 30-day limit that Your Honor set on that in the order -- in the pretrial.

[205] MR. LAROSA: I would say the question that I asked that he was trying to answer was simply telling the jury why he used the technology and what he uses it for.

THE COURT: I'll overrule the objection. He certainly can testify as to his opinion as to why he uses them.

Q. (BY MR. LAROSA) The -- I'm going to ask it again, though, just because you did not finish. What do you use the GPS technology for in doing your job?

A. I use it for law enforcement cases, identifying evidence, identifying locations where animals are killed. I use it for wildlife surveys. If I see a unique or interesting species of wildlife, I want to document that, I use my GPS to show at this place and time I saw this animal. I use it during hunting seasons to resolve conflicts between hunters and landowners to show where they're at and what that land status is. I have people send me coordinates to poaching cases for me to go look at, so I use my GPS to navigate my way to go find these spots. I use it a lot.

Q. The -- are there any other like law enforcement agencies in the state of Wyoming that use it?

A. Yes.

Q. The sheriff's office use it?

A. Yes.

[206] Q. Search and Rescue?

A. Yes.

Q. Forest Service officials?

A. Yes.

Q. The military?

A. Yes.

Q. Okay. Has -- do you have a -- a basic understanding of how it works?

A. Yes.

Q. Can you please explain?

A. Well, essentially there is a system of -- there's 24 different satellites that your actual GPS receiver, when it kind of gets in contact with these satellites, there's three different signals that each satellite sends to the GPS. And based on the triangulation of where the satellites are is in orbit, you can try to manipulate your position on the ground. So as you move, the distance between say Satellite A and me, as I move, the length of time it takes for that signal to come to the satellite to me, my receiver can tell that I'm moving and determine a waypoint based on triangulation.

Q. Okay. And on the date you took your locations, did you have any difficulty communicating with satellites?

A. No.

Q. The -- do you have any training in -- in [207] mapping?

A. Yes.

Q. What type of training do you have?

A. Well, I have -- actually, my college minor's in geography. So I took several mapping classes. But as far as like taking GPS points and putting them on a map, I've taken GPS training to essentially learn how to navigate the handheld device to know how it works and how to take a waypoint and how to transfer that to a computer.

Q. All right. Given your familiarity with the technology and with general principles of mapping, do you need to use a system of plane coordinates when you're creating your map of locations?

A. Yes.

MS. GRAY: And, Your Honor, I'm going to just interpose another objection that this is expert testimony, and it was not disclosed in a timely manner.

THE COURT: Overruled. He's already laid a foundation that he has general knowledge of these things, so he can testify.

Q. (BY MR. LAROSA) All right. In using the GPS technology that you use, do you utilize a particular system of plane coordinates for defining and stating the positions of points on the surface of the ground within the state of Wyoming?

[208] A. Yes. We use a datum that's called NAD 83.

Q. All right. Who developed that system?

A. The National Geodetic Survey.

Q. What is the National Geodetic Survey?

A. They're responsible, essentially, for having like the foundation of finding your position in America. I mean, they're the -- they're a subsection of NOAA, and their, essentially, mission is to make sure you know where you're at and you know your position.

Q. All right. The -- do surveyors utilize them? Their -- the information that they provide in their systems?

A. Yes.

Q. The -- who directed you to use the NAD 83 system developed by the National Geodetic Survey?

A. The Wyoming state legislature actually adopted it as the data set for the state of Wyoming in statute.

Q. All right. Do any other states use the NAD 83 system of plane coordinates?

A. 48 out of 50 do, as well as the federal government.

Q. All right. What's a control marker?

A. Control --

MS. GRAY: Your Honor, object to the term "federal government." I guess there's a lot of agencies in [209] the federal government. So if we can have a little more clarity who he's referring to.

THE COURT: All right. Mr. LaRosa, do you want to --

Q. (BY MR. LAROSA) Federal Aviation Administration?

A. Yes.

Q. Are you aware of any other specific agencies that use it?

A. Military. I would assume that I -- and I'm not sure (unintelligible).

Q. Don't assume.

A. Yeah.

Q. Don't assume.

A. I'm not assuming.

Q. The -- okay. What's a control marker?

A. A control marker is essentially a marker that is set up by the Geodetic Survey that is of an exact location and an exact latitude. And what they can use it for as a control or a baseline or a starting point when a survey is being made. They know exactly where this point is so they can reference that when they're surveying.

Q. Okay. And is there one in the area close to this fence that we have identified?

A. Yes.

[210] Q. All right. How far removed from that fence?

A. .1 miles.

Q. All right. And is it on the Montana or Wyoming side of the line?

A. It's on the Wyoming side of the line.

Q. All right. And does the National Geodetic Survey --

MR. LAROSA: Actually, at this time I'm going to ask the Court to take judicial notice of the fact that the legal boundary between the state of Wyoming and the

state of Montana and the Crow Reservation is the 45th north latitude.

THE COURT: And the Court does take judicial notice of that fact. And I will instruct the jury as follows: The Court has the power to take judicial notice of certain facts and events. This means that that fact is taken as true without the offering of proof at trial. However, a party is not prevented from disputing the judicially noticed fact by contrary evidence. You, the jury, have the duty of deciding all questions of fact. Therefore, you may either regard the judicially noticed fact as true, or if the evidence is -- the evidence so indicates, you may regard the fact as not true.

Q. (BY MR. LAROSA) All right. Does the National Geodetic Survey -- actually, do you know where the [211] marker -- can you find that marker yourself?

A. I know where it's at, but I've never been to it.

Q. The -- but you know its general location?

A. Yes.

Q. You could identify its approximate location on the map?

A. Yes.

Q. Okay. And does the National Geodetic Survey essentially make available in latitude and longitude coordinates the locations of their markers?

A. Yes.

Q. And do they make that available to the general public?

A. Yes.

Q. And how do you get that information from the National Geodetic Survey?

A. You go to their website.

Q. All right. And can you get it there?

A. Yes.

Q. All right. And have you obtained the data for the control marker that's in Hunt Area 38?

A. Yes.

Q. All right. Show you State's Exhibit 20 now. Do you recognize what I'm showing you? What is State's Exhibit 20?

[212] A. This exhibit is the National Geodetic Survey position of that marker.

Q. In other words, on that page can you actually see the coordinates of the marker that's located in Hunt Area 38?

A. Yes.

Q. All right. And are those coordinates south of the 45th parallel?

A. Yes.

Q. And can you see that -- is that highlighted on that page?

A. Yes.

MR. LAROSA: State would move its admission.

THE COURT: Any objection to Exhibit 20?

MS. GRAY: May I ask one question of the witness, Your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

Q. (BY MS. GRAY) Mr. Shorma, south of the 45th parallel as measured by this data set?

A. By this data set?

Q. Yes.

A. By the NAD 83 data set?

Q. Yes. Is that what you mean when you --

[213] A. Yes, yes.

MS. GRAY: No objection.

THE COURT: All right. 20 is admitted.

(State's Exhibit No. 20 received in evidence.)

DIRECT EXAMINATION (CONTINUED)

Q. (BY MR. LAROSA) Can you read those coordinates for the jury for that control marker?

A. Yes. Using NAD 83, the position of that survey control marker is 44 degrees, 59 minutes, 57.21924 seconds north, 107 degrees, 42 minutes, 35.48694 seconds west.

Q. Do you know how to work with information like that?

A. Yes.

Q. Okay. The -- the -- I'm not going to ask you if you remember that string of latitude and longitude numbers, but the three kill sites for whom you took coordinates -- in fact, the -- what system do you use to preserve numerically the -- a location?

A. I use UTMs, which is Universal Transverse Mercator.

Q. Is that something that's different than latitude and longitude?

A. Yes.

Q. All right. Is that a -- is that a -- an older [214] form of measurement or a newer form of measurement?

A. Newer.

Q. All right. Does this newer form of location measurement have a -- a -- is there a reason why you use UTM?

A. It's easier to use and it's more accurate.

Q. In what way is it easier to use?

A. It's easier to use --

MS. GRAY: Your Honor, I'm just going to interpose another objection in terms of that's expert testimony as to the accuracy of the UTM and it's more accurate than other systems. And, again, this was not given to us within 30 days.

THE COURT: It's overruled. I think he probably could just phrase it within his opinion it's easier to use or he believes it's easier to use. It's his opinion testimony so you're overruled.

Q. (BY MR. LAROSA) What kind of training did you actually get to learn how to use the UTM system and to learn the purposes for which it's designed?

A. I've had GPS training offered by the Game & Fish, as well as college courses I took on mapping and mapping software and GPSes.

Q. Does that training allow you to understand what the -- what the numerical system means when you see it?

[215] A. Yes.

Q. All right. And does it allow you to see and calculate the distance between two different points whose location is phrased using UTM?

A. Yes.

Q. All right. And what is it that -- what's easier about it to use?

A. Like latitude and longitude uses degrees, minutes, seconds. A UTM number, it's based off of a square meter. So my UTM point to the wall is only -- if the number's off by 10, it's 10 meters away. I don't have to try to convert the decimal points into seconds to try to identify how different it is. How far away it is. I can just tell you.

Q. Okay. The -- who else uses UTM in the state of Wyoming at least?

A. Most -- I'd say it's a mix. Some counties and other state agencies still use lat/lon, some still use UTM. It's an equal mix.

Q. Okay. The -- is there an ability to convert from one expression of a location using the UTM system to that location using the specification of latitude, longitude and degrees?

A. Yes.

Q. All right. And -- and in this case, did you do [216] that conversion?

A. Yes.

Q. And how did you do that conversion?

A. There's two different ways that I did it. The first way is there's -- I went to Montana State University, has a unique system website where you can convert UTMs to latitude and longitude. The

easier way to do it is when you have your GPS and you take a waypoint -- it doesn't matter -- when you take a waypoint, you take a waypoint you can scroll through the different data sets to decide how you want that information expressed. You want that information expressed in the UTM, the GPS will convert to UTM. If you want it expressed in latitude/longitude, it will convert and have it expressed as latitude/longitude.

Q. All right. And when you -- so you said you did the conversion two different ways. The -- in both ways, did the -- was the lat -- was the location of these three sites south of the 45th north latitude or 45th parallel?

A. Yes.

Q. By approximately how much?

A. A mile.

Q. You have stated you have some training in mapping. And do you use -- and you said, I believe, you use mapping when you do your job.

[217] A. Yes.

Q. Did you use mapping in this case to preserve evidence of where you found these kill sites?

A. Yes.

Q. All right. And -- and what mapping technology did you use to do that?

A. I took my coordinates off my GPS and put them on Google Earth.

Q. All right. And what is Google Earth?

A. Google Earth is -- essentially, it's a -- it's -- it's essentially a satellite imagery of the earth that anybody can download onto their computer and look at to determine locations that are distances, or --

Q. Is it like frozen in time or does it change?

A. It's continuously updated by satellite imagery. As they get new satellite imagery, they'll lay it on the old to essentially keep it as current as they can.

Q. If you go to -- if you use Google Earth, can you put in a -- basically using a set of coordinates, can you put in a location and Google Earth will generate the -- the terrain at that approximate location?

A. Yes.

Q. This will allow to you scale in and out as you desire?

A. Yes.

[218] Q. Does Google Earth have within its system knowledge of border lines?

A. Yes.

Q. And how do you know that?

A. Because I've seen them on Google Earth. I've compared them to known points that I've observed in the field.

Q. The -- so if -- if you go to Hunt Area 38 and you use Google Earth, will you generate a map from Google Earth that shows a portion of Hunt Area 38 and where Google Earth places the border?

A. Yes.

Q. All right. The -- and -- okay. I'm going to show you State's Exhibit 21. And who uses Google Earth? Are you the only person at Game & Fish that uses Google Earth, or who else uses it?

A. Everybody uses Google Earth.

Q. Right. The -- and that -- all right. What about other law enforcement agencies?

A. Yeah. The sheriff's office I know uses Google Earth. I know the Forest Service uses Google Earth as well as (unintelligible) photos.

Q. Okay. The -- what is State's Exhibit 21?

A. State's Exhibit 21 is a Google Earth essentially map that I generated by platting the GPS locations I [219] recovered from the field onto Google Earth.

Q. Can you -- so if you generate a map on Google Earth and it contains the area where you identified the location, if you -- can you put the coordinates in?

A. Yes.

Q. And will Google Earth then locate them on the map that it generates?

A. Yes.

Q. All right. And did you do that in this case?

A. Yes.

Q. All right. Now, you can -- you've been to the sites where you took the coordinates, right?

A. Yes.

Q. You're familiar -- are you familiar with the terrain in this area?

A. Yes.

Q. So are you familiar with the terrain shown in the full expanse of that photograph?

A. Yes.

Q. And does Google Earth appear to have placed, to you, the kill sites where you were actually standing when you took those coordinates?

A. Yes.

Q. All right. And does that photograph of -- of Google Earth, does it accurately portray that area of Hunt [220] Area 38, its topography and defining features?

A. Yes.

Q. All right. And can you see the state border line generated on that map?

A. Yes.

Q. All right. And --

MS. GRAY: Your Honor, I'm going to object here. May I ask the witness a question?

THE COURT: Yes.

VOIR DIRE EXAMINATION

Q. (BY MS. GRAY) Mr. Shorma, who puts the white line on the photo? Do you put that on manually or is it something that Google Earth does on its own?

A. Google Earth does it on its own.

MS. GRAY: Thank you.

Your Honor, we object. It's hearsay, it's -- well, I guess I'll wait until they offer it (unintelligible).

THE COURT: Mr. LaRosa.

DIRECT EXAMINATION (CONTINUED)

Q. (BY MR. LAROSA) The -- can you see the Marble Quarry Road in that photograph?

A. Yes.

Q. Can you basically -- and can you -- you know, do you recognize sort of where the line drawn by

Google, as [221] the border line crosses that Marble Quarry Road?

A. Yes.

Q. And does that Google map contain the area where you found both of those markers?

A. Yes.

Q. All right. And does the line drawn by Google appear to match the fence line running between those two barbs?

A. Yes.

Q. Those two boundaries.

A. Yes.

MR. LAROSA: State would move the admission of State's Exhibit 21.

MS. GRAY: Your Honor, our objection, is Your Honor, that if Google is going to testify in this courtroom, someone from Google should come and testify. We believe it's hearsay. I'm not sure the authentication has been put in. And our most -- our pressing objection is it's a violation of the (unintelligible).

THE COURT: Mr. LaRosa.

MR. LAROSA: I just want to be clear. If the objection is a hearsay objection, the State would submit that there is no declarant here. There is no assertion being made by any out-of-court person. Hearsay is something that does not apply to systems or processes. [222] And the map that's generated here is the result of technology operating according to code. And it's not hearsay if there's no declarant, and there is no declarant here.

If the issue is authentication, we would meet that if simply offered enough to show what it was, what it purports to be. He's testified that it matches the fence line and appears to put the border exactly where he found the boundary fence, and we believe that is sufficient.

THE COURT: The objection is overruled. It's admitted.

(State's Exhibit No. 21 received in evidence.)

Q. (BY MR. LAROSA) All right. Will you please just, I guess, hold that up. Actually, no. Wait. The -- I'm going to show State's Exhibits 22 and 23.

The -- do you recognize what those exhibits are?

A. Yes.

Q. Were those exhibits likewise generated using Google Earth?

A. Yes.

Q. Do they contain information that you added to -- and are they -- do they portray the same -- same area as exhibits -- State's Exhibit 21?

A. Yes.

[223] Q. All right. What is the difference with respect to State's Exhibit 22?

A. 22 essentially has a line essentially drawn the shortest distance between state line and the sites where these animals were killed with the approximate distance of a mile. It also labels the Eskimo Creek Drainage, the states of Montana, Wyoming, as well as the Marble Quarry Road.

Q. All right. Let me ask you a question about -- when you did this calculation of the distance to the state line, how did you do it?

A. Google has a tool on Google Earth, a distance tool, that you can measure in about any unit that you like. I just put one pin on where I knew the state marker was at the fence and pulled it out to where the -- the kill sites were.

Q. Okay. The -- and the -- you mentioned before the shortest distance. What do you mean by the shortest distance?

A. Well the -- this picture's kind of at an angle, so it looks like the -- the line from the -- I guess since this is sitting at an angle, that this line of distance is an angle because that is the shortest distance between the known marker at the state line and where these -- where animal --

[224] Q. All right. Does the line that you placed on that essentially kind of match the angle of measurement that you took?

A. Yes.

Q. All right. Did you -- when Google generated its own map of that area, does it put the name of the road down on it?

A. No.

Q. What have you done in State's Exhibit 22? Have you identified any other features?

A. Yes. I identified the feature of Eskimo Creek, the location of Montana, Wyoming and the Marble Quarry Road.

Q. Okay. The -- and are the kill -- are the --

MR. LAROSA: State would move the admission of State's Exhibit 22.

THE COURT: Any objection on 22?

MS. GRAY: The same objection to be made to (unintelligible), Your Honor.

THE COURT: All right. And that objection is overruled and 22 is admitted.

(State's Exhibit No. 22 received in evidence.)

Q. (BY MR. LAROSA) All right. And what's State's Exhibit 23, Mr. Shorma?

[225] A. 23 is the same map as 21 and 22. I added the position of the state line sign, the Forest Service marker, as well as how the fence line runs along the state line.

Q. All right. And so where you draw that in, can the jury see where it -- in any location as to the actual physical -- where the physical fence in any way departs from the boundary line drawn by Google?

A. Yes.

Q. All right. And -- and in State's Exhibit 22 again, can the jury see approximate -- the approximate location of the two boundary markers that you found and photographed in that area?

A. Yes.

Q. All right. And you testified earlier, we admitted as State's exhibit, it shows some perspective from the fence line looking in the general direction of the ridge above Eskimo Creek. Is that likewise identified on location by that map?

A. Yes.

Q. And so can the jury appreciate where these things are if -- if they look at State's Exhibit 23?

A. Yes.

MR. LAROSA: State would move its [226] admission.

MS. GRAY: Same objection, Your Honor.

THE COURT: The objection is overruled. 23 is admitted.

(State's Exhibit No. 23 received in evidence.)

Q. (BY MR. LAROSA) Can maps be hard to read if they're small?

A. Yes.

Q. All right.

MS. GRAY: Are they demonstrative?

MR. LAROSA: Demonstrative.

Q. (BY MR. LAROSA) Do you think it would be helpful to explain where these things were if the jury -- if the jury could see things blown up a little bigger?

A. Yes.

Q. Okay. What's State's Exhibit 24?

A. 24 is a blown-up version of State's Exhibit 22.

MR. LAROSA: All right. State would offer it -- its admission for demonstrative purposes.

MS. GRAY: And as to the demonstrative, no objection, Your Honor.

THE COURT: All right. It's admitted for demonstrative purposes.

(State's Exhibit No. 24 [227] received in evidence.)

Q. (BY MR. LAROSA) All right. Let's please identify for the jury, if you could, where stuff is on this map. Where's the border drawn at?

A. Google Earth draws the border in as being this light kind of grayish-blue line that runs across the edge.

Q. All right. And we mentioned before that kill sites are on the ridge above Eskimo Creek. Where is Eskimo Creek?

A. This drainage right here is Eskimo Creek.

Q. All right. And you mentioned before that there's a gap in the state line where Marble Quarry goes across the state of Montana into Wyoming. Where is Marble Quarry Road on this map where it crosses the state line?

A. The Marble Quarry Road is this road right here, and it crosses the state line in this little -- kind of little valley right here.

Q. All right. Where is the ridge above Eskimo Creek?

A. This would be the ridge above Eskimo Creek. There's kind of just a -- like a head of Eskimo Creek. It kind of drops off the backside into the west fork of the Little Horn. So all this kind of timbered ridge right here is the ridge above Eskimo Creek.

Q. All right. Now, there are four green balloons [228] with identifying language in the area of Eskimo Creek. Will you please explain what these markings are.

A. Where I have marked Clayvin site, this is the GPS waypoint that I took when I found the pelvis and the kill site based on the Monster Muleys photograph.

Ronnie's site is the GPS location I took finding the pelvis, as well as -- essentially when we compared the photos of Ronnie and DL from Monster Muleys to what we found in the field, this would be the GPS waypoint for that -- where that elk died.

The Colton site, when I went back on June 2nd, when the snow had melted, I was able to find that other elk rib cage and pelvis. That was the appropriate position where we found that. That's a GPS location where those were discovered.

This says unclaimed bull. There was another bull found dead at this location that had nothing taken off of it.

Q. Okay. The -- and does this line approximate the sort of -- where it kind of happened?

A. Yeah. This is -- from the state line to where these are at, the shortest distance is at this angle.

Q. Okay. And I'll show you State's Exhibit 25. Do you know what that is?

A. Yes.

[229] Q. What is that?

A. It is essentially a blown-up version of State's Exhibit 23.

Q. All right. And is it easier to see features on it in this size?

A. Yes.

MR. LAROSA: State would move its admission for demonstrative purposes only.

MS. GRAY: No objection as to demonstrative, Your Honor.

THE COURT: It's admitted for demonstrative purposes.

(State's Exhibit No. 25 received in evidence.)

Q. (BY MR. LAROSA) Okay. The -- are the same four sites, the Clayvin site, the Ronnie site, the Colton site and the unclaimed bull site also located in the same location?

A. Yes.

Q. The -- all right. What do we have here? Please explain to the jury what else has been placed on this map.

A. I placed -- from the earlier exhibit that shows -- I guess it would be Exhibit 18 -- that shows the U.S. Forest Service sign as well as Exhibit 19, that shows the brass cap underneath it. That was found on this ridge [230] to the west of where the Marble Quarry Road enters Wyoming.

From Exhibit 16, that shows the location of where the -- the -- the state of Wyoming sign and the brass forest cap are at are there at this X. The photograph that I took from the state line looking up drainage into Eskimo Creek is signified by this blue X as a photographic location.

This red line, it goes across the face, this is actually how the fence runs. I've walked it, so I -- I marked this location on this map as well.

Q. The -- okay. So can the jury see where the Google boundary diverges from the actual boundary, the line on (unintelligible)?

A. Yes. There's -- you can see it runs right with it right here. The fence has a little jog over here on the other side of Dry Ridge here. But otherwise in the area between the Marble Quarry Road and Eskimo Creek, it's right on.

Q. Okay. You've been to this area. You collected remains of this area. You mentioned that the -- the Eskimo Creek is kind of -- I don't remember your exact words, but somewhat of a ravine at points.

A. Yes.

Q. The -- if you were carrying -- you yourself were [231] carrying any substantial amount of weight off the area where you found these kill sites, what would be the least onerous way out?

A. Well, as -- as Eskimo Creek goes down -- as the water runs down Eskimo Creek down into Montana, the ravine gets steeper and deeper. Personally, if I had killed an elk, where these elk were found, the easiest way to get them out of the -- to get them out of here would be to drag them across over by the Marble Quarry Road and go down by the bottom. Because down here it's just deep and rocky and nasty.

Q. And if you -- if you took that route, would you generally follow Marble Quarry Road?

A. Yes.

Q. And if you crossed into Montana along that road, would you go through -- would you go past the state line sign that you posted?

A. Yes.

Q. Okay. After May 19th and June 2nd, what further investigation did you do?

A. Well, we needed to -- to contact the individuals that we believed were responsible. We also -- being that we had found evidence on Facebook, we served warrants on Clayvin Herrera, Ronnie Fisher and DL Singer's Facebook pages.

[232] Q. All right. And -- and when approximately -- during what period of time did you engage in that type of investigative work?

A. It would have been towards the end of June.

Q. All right. Were those -- were those search warrants -- your authority to conduct those search warrants granted by a judge?

A. Yes.

Q. And was -- were they subsequently executed by contacting Facebook?

A. Yes.

Q. And did Facebook provide the requested material?

A. Yes.

Q. And did that material include materials saved by Facebook covering the period of January 2014?

A. Yes.

Q. Okay. The -- and did you examine that material yourself?

A. Yes.

Q. All right. And did the photographs on -- in State's Exhibits 12, 13 and 14, the Monster Muleys photographs -- the photographs on Ronnie Fisher's -- that you saw on April 26 on Ronnie Fisher's Facebook post, that set, I believe, is portrayed in State's Exhibit

10, were those photographs supplied as part of that return?

[233] A. Yes.

Q. All right. And, likewise, the discussion postings, were they likewise provided?

A. Yes.

Q. And were these photos in State's Exhibit 11 excerpted from DL Singer's Facebook page in April, were those likewise provided to you by Facebook?

A. Yes.

Q. Okay. You mentioned that -- is it logical -- when you get this sort of information that you had in this case, you generally attempt to make contact with people who are the focus of your investigation?

A. Yes.

Q. That's standard practice?

A. Yes.

Q. All right. And, basically, by the time all the stuff that you've discussed is done, basically who are the people that you wanted to talk to?

A. We wanted to talk to Clayvin Herrera, Ronnie Fisher, DL Singer and Colton Herrera.

Q. All right. Did you decide to attempt those contacts?

A. Yes.

Q. Who did you attempt to contact first? Who did you decide to contact first?

[234] A. Clayvin Herrera.

Q. All right. And approximately when did you begin to attempt to contact him?

A. I believe it was at the end of July I sent him an email asking him if he'd want to meet along the state line.

Q. Did he respond to the email?

A. He did.

Q. Did he -- did he agree to meet you at that time?

A. No.

Q. Did you make any further attempt?

A. I think I sent him a -- if I recall, I sent another email to him, and I don't think he responded to that one.

Q. All right. What happened after those two things happened?

A. Well --

Q. And where did you want to meet him when you tried to set up a meeting?

A. We were hoping to meet him in Wyoming.

Q. Okay. All right. Were you able to get that done?

A. No.

Q. What happened after you were unable to set up a meeting with Wyoming? What happened?

[235] A. Well, it was back -- we had to go kind of back to the drawing board on how we thought it would be best to approach, you know, interviewing Clayvin. So we essentially enlisted the help of the BIA, Bureau of Indian Affairs, to help us with that.

Q. All right. Where is the BIA -- office of the BIA that you contacted?

A. The BIA tribal police, they have an office in Crow Agency. We attempted to meet him there by

having essentially Jose Figueroa, the police chief, make contact with him and make a meeting.

Q. Was a date for a meeting scheduled as a result of those -- those contacts and requests?

A. Yes. September 11th.

Q. All right. And did you go to Crow Agency on that occasion in anticipation of that meeting happening?

A. Yes.

Q. Did you go alone? Did anybody else go with you?

A. I went with our investigator out of Casper, Mike Ehlebracht. And I went with our investigator out of Lander, Scott Browning.

Q. All right. Did the meeting take place?

A. No.

Q. All right. What happened next?

A. We -- I believe Clayvin had sent Jose a text [236] saying he couldn't make it the morning of the 11th. So we planned on meeting him the following day on the 12th.

Q. Did you go back to that same location on the 12th?

A. Yes.

Q. Was the meeting set for any particular time?

A. 10:00.

Q. All right. Did -- did defendant show up at 10:00?

A. No.

Q. What happened after that?

A. Well, we couldn't get ahold of him, so Jose contacted kind of I guess the supervisor of the Tribal Fish & Game at that point -- his name is Martin Not Afraid -- to come and talk with us, to kind of explain the situation to him to hopefully get Clayvin to come in and talk to us.

Q. All right. And as a result of that request, did -- did the defendant show up that day?

A. Yes.

Q. Approximately what time did you meet with him?

A. It was about 10:00. Lunchtime.

Q. Okay. Did he say anything to you upon arrival?

A. Yeah. He -- Martin had told him kind of the gist why we're there, to talk about some elk illegally [237] being killed. When Clayvin showed up, he said something to the effect of I'm here to receive some citations or something.

Q. Okay. Before speaking to him, did you advise him of his rights?

A. Yes.

Q. Did he agree to speak to you?

A. Yes.

Q. Did you discuss what you'd -- the nature of the investigation? Did you or anybody who was with you tell him the nature of the investigation you had conducted?

A. Yes.

Q. All right. Did he -- did you make clear to him when you did that, that you considered him a suspect in the violation of laws?

A. Yes.

Q. Did you proceed after you did that -- did you show him any of your evidence?

A. Yes.

Q. Okay. I'll show you page 1 here of State's Exhibit 8, a photograph that you said you found on Monster Muleys on January 30th of 2014. Did you show him that photograph?

A. Yes.

Q. Did he acknowledge that it was him in that [238] photograph?

A. Yes.

Q. Did you show him that photograph marked as page 1 of State's Exhibit 12?

A. Yes.

Q. Which is a photograph, I believe you testified a photograph you found on Monster Muleys on January 30th of 2014; is that correct?

A. Yes.

Q. When you showed him that photograph, did he say whether he killed the elk that (unintelligible)?

A. He acknowledged that he had killed that elk.

Q. Did he say when the kill occurred?

A. He said winter.

Q. Did you show him the map?

A. Yes.

Q. Showing you State's Exhibit 24, which is the demonstrative exhibit of State's Exhibit 22. How similar is that to the map that you showed him?

A. Similar.

Q. Does the map you showed him show that same area?

A. Yes.

Q. Did it show the location of the sites?

A. Yes.

Q. Did it show the lines of the state line?

[239] A. Yes.

Q. And did it have the markings -- the markings of the state of Wyoming on it?

A. Yes.

Q. The -- what did you tell him when you showed him that?

A. Well, we told him that we had discovered location where he had killed his elk. We needed to kind of work it out, essentially. We essentially asked him, you know, who was with him during that hunt.

Q. Did you tell him that -- when you pointed to the place -- I'm sorry to interrupt you. But when you pointed to the place where his site was, did you tell him how far into Wyoming that was?

A. Yes.

Q. What did he say, if anything?

A. He didn't say anything. When I, you know, told him that you know that state line -- that the fence was running on the state line, he acknowledged, yeah, looking at it.

Q. All right. And then you started to say that you asked him who was with him. Did he have any answer when you asked him who was with him on that hunt when he killed the elk he said that he killed?

A. Yes. He told us Ronnie Fisher, DL Singer, [240] Colton Herrera, Colton Herrera, Jr., Daniel Ceasley and Barry Whiteman.

Q. Showing you page 1 of State's Exhibit 13, a photograph of Ronnie Fisher and DL Singer that you found on the Monster Muleys website on January 30, 2014. Did you show him this photo?

A. Yes.

Q. All right. Did he identify who killed that?

A. Yes.

Q. Who did he say killed it?

A. He said Ronnie Fisher killed that elk.

Q. The -- and did you show him that photograph?

A. Yes.

Q. All right. Okay. The -- in his statements to you -- so -- okay. So he told you the other people who were with him that day were -- included Ronnie Fisher and DL Singer?

A. Yes.

Q. And Colton -- what's the name of his brother?

A. Colton Herrera, Sr.

Q. Is?

A. That's his -- that's his son in that photograph, Colton Herrera, Jr.

Q. Okay. Let's go back to this map for a second. In his statements to you that day, did he describe to you [241] how they came to shoot these animals?

A. Yes.

Q. And did he do that utilizing the map that we're showing here?

A. Yes.

Q. Can you identify, using this map, basically what he pointed to and what he said?

A. That they had started -- there's kind of a bowl down here that they started in. The elk were moving up the ridge, so they moved up the ridge behind them. And they got into some trees. He kind of believed at one point the elk hunt was over because they didn't see any more.

Q. And to be clear. He was pointing at the map?

A. Yes, he's pointing up --

Q. Is he actually pointing to --

A. -- up here.

Q. -- points that you're pointing to --

A. Yes.

Q. -- when he's giving you his explanation?

A. Yes.

Q. Okay.

A. He said he thought it was over until he got into these little trees over here and he said he saw the rump, a butt, of an elk.

[242] Q. Where?

A. Over here.

Q. Okay. And then what else did he tell you? And so he stated that he's here when they saw the animals?

A. Yes.

Q. Did he say how many animals they saw?

A. Three.

Q. Did you ask him how many animals they killed that day?

A. Yes.

Q. And how many did he say?

A. He said three.

Q. All right. When he told you that he was in this location, when he saw the animals, how far in Wyoming is he?

A. Over three-quarters of a mile. Right at three-quarters of a mile.

Q. Did he make any statements to you when you were talking to him about sort of when they planned to actually go on this hunt?

A. They planned it the night before.

Q. Did he say what time of the day they actually saw -- when the kill occurred, when they saw the animals, what other details did he provide you about what happened that day?

[243] A. The time of the kill was between 9:00 and 10:00 in the morning.

Q. And when did they first -- according to him, when did they first see the animals? If he said so.

A. I -- he had seen them the night before, but he didn't specify that day when they had seen them.

Q. All right. The -- did he know where the head was to the animal that he said he killed?

A. Yes.

Q. And where was that?

A. That was at his father's house in Hardin.

Q. Okay. As a result of what you learned in your investigation and what he told you that day, what did you do with respect to Mr. Herrera?

A. He was informed that he could be cited or we could do it essentially long form.

Q. What decision did you make to do?

A. He decided to voluntarily accept the citations.

Q. All right. So you issued citations, and what did you issue citations for?

A. I issued citations for being an accessory to taking antlered elk during a closed season and taking an elk during a closed season.

Q. All right. Did you have any requests of him -- when you issued him the citations, did he have any [244] questions for you and when he accepted them?

A. He was -- just was wondering where the courthouse in Sheridan was.

Q. And did you tell him where it was?

A. Yeah.

Q. Okay. The -- you told him -- you just testified a minute ago that he knew where the head was. What happened -- did you have any requests of him?

A. Sometimes it could be difficult finding people around Crow Agency. I handed him my business card and asked him if his brother or any of the other

individuals who -- if he saw them, if they could make it easy, just contact us, we'd contact them and interview them.

Q. I must have asked the question poorly. He told you he knew where the head was of the elk rack that he killed.

A. Yes.

Q. Did you go get that rack?

A. Yes, we did.

Q. All right. How did that happen?

A. He had to get some gas at the gas station there, and we followed him to Hardin where we stopped in front of a residence and retrieved the head.

Q. All right. Did that occur that same day?

A. Yes.

[245] Q. And did you -- so did -- what did you do with the elk -- when you saw the elk rack, did you recognize it as the elk rack in the photograph?

A. Yes.

Q. And what did you do with the elk rack?

A. Essentially, the elk rack was -- when we -- when Clayvin gave it to us, it was -- we put a seizure tag on it, documenting we had received it from him, and we issued him a receipt indicating to him that we had taken the head.

Q. All right. And did you place the -- that rack into evidence?

A. Yes.

Q. The did -- okay. You said you saw it and you recognized it as the elk rack from the Monster Muleys

photos. Can you explain why you were able to recognize it?

A. Well, the bull, looking at the photograph -- like I stated earlier, it's got on the left side, the second brow tine is kind of small and kind of lays against the beam, so that you're looking at it head on, you can't really see it. And when I saw -- when I saw that point I knew -- his bull also, kind of on the -- the tail end of it, it's kind of got some mass. It's kind of -- it's got some nice mass to it. I recognized that as being the elk.

[246] Q. Okay. I'll show you State's Exhibit 26. What is that?

A. That is a recreation of our fish habitat biologist holding the head that we received from Clayvin Herrera, trying to get the angle correct from the picture we downloaded from Monster Muleys showing it's the same elk.

Q. So there's two photographs in that State exhibit. One of them is the Monster Muleys photo where he is wearing the rack?

A. Yes.

Q. And second photo is a Game & Fish employee attempting to hold it the same way?

A. Yes.

Q. All right. And would it -- does it kind of make the similarities between the rack and the rack seen in the Monster Muleys photograph evident to you?

A. Yes.

MR. LAROSA: State would move the admission of State's Exhibit 26.

MS. GRAY: No objection.

THE COURT: 26 is admitted.

(State's Exhibit No. 26 received in evidence.)

Q. (BY MR. LAROSA) Can you please just hold it up [247] and show it to the jury. Thank you.

You mentioned just before I interrupted you and asked you a different question, that you asked him for a little help in -- in locating some of the other individuals. What was your specific request again?

A. If he could contact some of the other individuals that he had told me were with him, especially his brother, to help us contact him and resolve this issue.

Q. Okay. And is -- by -- by his brother, you mean Colton Herrera?

A. Colton Herrera, Sr., yes.

Q. Okay. And did his brother subsequently call you?

A. Yes.

Q. When did that happen?

A. I was not home when he called the first time. I believe it was the 14th of September. I called him back on the 26th, and I believe I talked to him again on the 29th of September, and we agreed to meet the following day, on the 30th.

Q. And where did that meeting subsequently take place?

A. It was at the BIA police office.

Q. Okay. Okay. When you met with him, did you [248] obtain any of the -- any evidence from him?

A. Yes. Yes. We asked to speak with him. He didn't want to speak with us. He was issued a citation.

We asked if we could get the elk head back, and he said yeah. So we followed him to his residence in Crow Agency and he provided us with the elk head.

Q. Okay. And what did you do with that elk head once he gave it to you?

A. It was seizure -- seizure tagged and put into evidence, locked into evidence.

Q. That tag, did you identify that you take it from him -- that you took it from him?

A. Yes.

Q. All right. I'm going to show you State's Exhibit 27. There are two photographs on that exhibit, are there not?

A. Yes.

Q. What are those two photographs?

A. Photograph on the left is Colton Herrera, Jr. holding the elk head from the elk he harvested. And the photo next to him is our aquatic habitat biologist holding the same head, trying to hold it in the same manner to kind of recreate the photograph from Monster Muleys.

Q. All right. And does examining that -- and when he gave you that rack, did you recognize it as the rack [249] that was in the photograph of his son, standing in front of that dead elk at the kill site that you found?

A. I did. It's got kind of unique -- kind of -- it's -- its eye guards are kind of close together. And I believe on the right side it's kind of got a little wave to it that I recognized when I saw it.

Q. And can you use that exhibit to explain what you mean by that to the jury, please?

MR. LAROSA: I will stay -- move the admission of State's Exhibit 27 now.

MS. GRAY: No objection.

THE COURT: 27 is admitted.

(State's Exhibit No. 27 received in evidence.)

Q. (BY MR. LAROSA) Please proceed, Warden.

A. So here is the Monster Muleys photograph. Here's the photograph that we recreated. You can see these -- these points, these eye guards, are some -- some bulge way out. Some are kind of narrow. On both sides of this elk they're kind of close together to one another. It's also on the -- on the right side, on the last point, there's kind of like a little wave to it. You can see in this photograph, the same picture has that little wave to it.

Q. Okay. Were you able to make contact with [250] Ronnie Fisher?

A. Yes.

Q. When did that occur?

A. It was October 2nd of 2014.

Q. All right. Were you able to -- did you -- did he give you anything?

A. Yes. He gave us an elk head.

Q. Okay. And when he gave you an elk head, did you recognize that elk head?

A. Yes.

Q. And what -- what did you recognize it to be?

A. It -- it appeared -- it wasn't so obvious as these two, but it appeared to be the same elk from the

photograph that I downloaded off the Monster Muleys website.

Q. And by that, are you referring to the photo of -- of him and DL Singer standing over a dead elk?

A. Yes. Shaking hands, yes.

Q. Let me show you State's Exhibit Number 28. There are two photographs in that exhibit, are there not?

A. Yes.

Q. And is one of them the photograph of Ronnie Fisher and DL Singer standing over the elk at the site that you later found?

A. Yes.

[251] Q. What is the other photograph?

A. The other photograph is a recreation that did in our office with another Game & Fish employee.

Q. And the -- when Ronnie gave you that, did you recognize it to be the elk from the photo?

A. Yes.

Q. The Monster Muleys photo.

And does that comparison shot allow you to explain and the jury to see the reason why you believe that it was?

A. Yes.

MR. LAROSA: State would move the admission of State's Exhibit 28.

MS. GRAY: No objection.

THE COURT: 28 is admitted.

(State's Exhibit No. 28 received in evidence.)

Q. (BY MR. LAROSA) Please proceed and explain.

A. So you can see -- it's kind of hard to see the left side, so I really couldn't tell. But on right side, a fifth point kind of comes back. It's real short. It just kind of comes back and stops. If you look in this picture, it's kind of hard to see. You can kind of see it poofing out right there in the photograph with Seth [sic]. You can also see -- other thing I noticed is on again on [252] his eye guards, the first eye guard is a lot longer than the second one. You can really see it in the picture of Ronnie and DL. Given the angle, you can't really see it very well in that one. But that's what I noticed about the two.

Q. Thank you.

Did you meet with DL Singer also?

A. Yes.

Q. And when did that occur?

A. That occurred -- I believe it was February of 2015, when we finally met with DL.

Q. All right. Were citations issued to him and Ronnie Fisher also?

A. Yes.

MS. GRAY: I'm sorry. I didn't hear the date you said you met with Ronnie.

THE WITNESS: I'm sorry?

MS. GRAY: I did not hear the date you said you met him.

THE WITNESS: It was in February.

MS. GRAY: Of what year?

THE WITNESS: I believe it was 2015.

MS. GRAY: '15.

THE WITNESS: Yes. I'd have to refer to my notes on exact date.

[253] Q. (BY MR. LAROSA) Would it be fair to say it was well after the time of the other interviews?

A. Yes. It was the last one.

Q. The -- okay. All right. You testified that you -- you found remains at the three sites set forth in State's Exhibits 12, 13 and 14, and that they were placed into evidence, that you were given elk racks from Clayvin Herrera, Colton Herrera, Jr. and Ronnie Fisher, and that you recognize them to be the elk racks in the photos. And in the case of Mr. Herrera, the photo -- the elk rack -- the elk that he said he killed, and that you placed this all in evidence.

What did you -- did you do anything subsequently with the evidence that -- with those six items that you seized and placed into evidence?

A. Well -- excuse me -- since we believed we had the heads that would match the kill sites on the mountain, we sent all -- all three pelvises and all three elk heads to our forensic lab for species identification, for gender identification and then for DNA matching to see if the pelvises we found in the field matched the heads that we recovered from the individuals.

Q. All right. And is this sort of the matching capabilities that you were discussing at the outset of your testimony several hours ago?

[254] A. Yes.

Q. The -- and is that -- is -- all right. And the -- were the items actually sent there?

A. Yes.

Q. And did you get -- did you -- were those the three things that you asked for performed?

A. Yes.

Q. And did you get the results back?

A. Yes.

Q. Okay. And were -- was the evidence returned to you?

A. I believe the -- we had the heads. The pelvises -- yeah, we actually have all of it.

Q. Okay. Okay. When you open a case, do you give it a number?

A. Yes.

Q. Do you recall the number you gave in this case?

A. It's 33114/16.

Q. Okay.

MR. LAROSA: One second, please, Your Honor.

THE COURT: Yes.

Q. (BY MR. LAROSA) You stated you received the report of the results from State's Exhibit Number 3. Is this that report?

[255] A. Yes.

MR. LAROSA: Those are all the questions I have at this time, Your Honor.

THE COURT: All right. I think due to the time we'll take our evening recess and start with cross-exam in the morning, Mr. Shorma. So you may step down. * * *

Excerpts from Trial Transcript
Circuit Court of Sheridan County,
State of Wyoming
April 28, 2016

[269] THE COURT: All right. Thank you.

All right. Warden Shorma, you want to come back up to the stand. You're still under oath.

And, Ms. Gray, you may cross-exam.

MS. GRAY: Thank you, Your Honor.

DUSTIN SHORMA

called for examination by Plaintiff, having been previously sworn, testified further as follows:

CROSS-EXAMINATION

Q. (BY MS. GRAY) Morning, Warden Shorma.

A. Good morning.

Q. I don't think we met officially. My name is Kyle Gray, and as you know, I'm representing Mr. Herrera.

I'm going to start with a pretty important, straightforward question for you, which is you testified yesterday that you had a fairly extensive interview with Mr. Herrera up on the Crow Reservation regarding this matter; is that correct?

A. Yes.

Q. And you thought at that time, and you believed then, that Mr. Herrera was honest with you; isn't that right?

A. Yes.

Q. And he's never told you a lie, has he?

MR. LAROSA: I would object. That's asking [270] him to speculate.

MS. GRAY: Fine.

THE COURT: Sustained.

MS. GRAY: Withdrawn.

Q. (BY MS. GRAY) After your interview, you, in fact, told your fellow investigator you were impressed with his honesty; isn't that right?

MR. LAROSA: I'd object. That calls for a hearsay statement.

THE COURT: If it's the statement of Warden Shorma, it would not be hearsay, so that would be overruled.

You may answer.

A. Yes.

Q. (BY MS. GRAY) And you believe he was truthful in that interview, correct?

A. I believe saying like yes or no wouldn't adequately describe -- I think more so than not. I mean, there was some indiscrepancies [sic].

Q. Mr. Shorma, you said to Mr. Ehlebracht that he was honest, didn't you?

A. Overly, yes.

Q. I'm sorry. What did you put in front of that?

A. Well -- yes. Like overly.

Q. Again, what was your qualification there?

[271] A. Yes.

Q. So yes. The answer is yes.

A. Yes.

Q. We'll go through some more about your interview Mr. Shorma, but I did want to ask you a couple of questions regarding the boundary dispute.

MS. GRAY: Your Honor, may I approach?

THE COURT: Yes.

MS. GRAY: (Unintelligible) do you have the exhibits from yesterday?

THE COURT: They're on the corner right back there. The bailiff can hand them to you.

MS. GRAY: (Unintelligible.)

Q. (BY MS. GRAY) Do you remember this exhibit, Mr. Shorma?

A. Yes.

Q. Hang onto it for a minute.

So Mr. Shorma, we had some testimony yesterday regarding the border -- the marking of the border between the Crow Reservation and the Bighorn National Forest between the state of Montana and state of Wyoming. I'm sure you remember that, don't you?

A. Yes.

Q. Okay. That exhibit you have there, what does that red mark show?

[272] A. The red line --

Q. Yes.

A. -- as it's -- as it's drawn on this photograph, indicates the location where the fence is.

Q. And so you testified yesterday that you were confident that that fence marked the -- the border, correct?

A. Yes.

Q. So when you look at that -- you can hold it up for -- for the jury -- the fence runs straight and then takes a jog up to the north, doesn't it?

A. Yes.

Q. Parallel lines don't jog like that, do they?

A. No.

Q. So that fence is wrong, isn't it?

A. That portion of it.

Q. It's not marking the border there.

A. No.

Q. And that's obvious because you think the border is below. To you, that's your belief, that one portion is right and the other portion is not?

MR. LAROSA: I'm going to object. I believe she's asking him for a legal opinion.

THE COURT: Overruled.

Q. (BY MS. GRAY) You remember the question?

[273] A. Would you restate it for me, please?

Q. Yeah. Sorry. Your belief is one portion of the fence marks the border and one portion doesn't.

A. Yes.

Q. Okay.

MS. GRAY: May I approach, Your Honor?

THE COURT: Yes.

Q. (BY MS. GRAY) Mr. Shorma, I'm handing you a document. Can you tell me what the name of that document is?

MR. LAROSA: Your Honor, I have an objection to make, and I would like to approach.

MS. GRAY: All right.

(Inaudible sidebar conference.)

MS. GRAY: May I have a moment, Your Honor?

THE COURT: Yes.

Q. (BY MS. GRAY) Mr. Shorma, when you looked into this issue of where this crime occurred, you investigated that -- you testified yesterday that you feel like you investigated that thoroughly, correct?

A. Yes.

Q. Did you do any specific investigation regarding the -- I also believe you testified, didn't you, that the fence was maintained and erected by grazing permit holders in the Bighorn National Forest. Do you remember that?

[274] A. That's correct.

Q. And that those are people who own -- hold permits from the United States Forest Service, that they are not governmental officials; is that correct?

A. That's correct.

Q. Did you look for any investigative materials that might be important to your conclusions that have been issued by governmental issues -- governmental officials? So anyone from a government authority discussing the issue of where the border is or are there disputes regarding the border.

A. I did not.

Q. You did not.

That would have been a more thorough investigation, wouldn't it?

A. Yes.

Q. Mr. Shorma, so your -- your district, as you testified yesterday, how long did you say the border was between your district and the Crow Reservation?

A. I answered yesterday that my district borders the state of Montana by approximately 80 miles. It probably borders the Crow Reservation for 45, 50 miles, maybe.

Q. Okay. Have you ever looked to see where the Crow boundary starts and where it ends?

[275] MR. LAROSA: I would object on relevance grounds.

THE COURT: Any response to that?

MS. GRAY: Pardon -- pardon me, Your Honor?

THE COURT: Do you have a response to --

MS. GRAY: Yeah. My response is I'm going to ask Mr. Shorma about his involvement with the Crow tribal officials and what his knowledge is regarding where he should be carefully considering whose boundary he's dealing with.

THE COURT: I guess my question, are -- can you narrow the question as to his -- what boundary you're talking about?

MS. GRAY: Oh, sure.

Q. (BY MS. GRAY) So you recognize, then -- I think you just said, there are -- so there's a boundary between the states, Montana on the north and Wyoming on the south; is that correct?

A. Correct.

Q. Okay. And so parts of that boundary are also not just the state of Wyoming, the state of Montana. There's also some other governmental recognized areas. So the Bighorn National Forest, for example, is part -- is inside Wyoming --

A. Correct.

[276] Q. -- but it is also a federal property; is that correct?

A. Correct.

Q. Okay. And so the -- the Wyoming-Montana border, as it goes past or along the Bighorn National Forest, that border there involves the state of Wyoming, the state of Montana and the United States government; is that correct?

A. That's correct.

Q. Okay. So -- and then there's a fourth area there. That is the Crow Reservation, correct?

A. Correct.

Q. And that too is the same boundary, but parts of it are in your district, parts of it are not; is that correct?

A. Correct.

Q. Okay. And that borders -- so on the east there are parts of your district that border Montana, but not the Crow Reservation; is that correct?

A. Correct.

Q. Are there parts of your district that border the Northern Cheyenne Reservation?

A. No.

Q. Okay. So where does your district border -- or does the border between Montana and Wyoming -- let's see how to ask this. Where is -- is there a spot to the east [277] of where the border is on the Crow Reservation that is just between Montana and Wyoming and not between Montana, Wyoming and an Indian reservation?

MR. LAROSA: I would object to the relevance of this line of questioning.

THE COURT: Overruled. You may answer.

A. Yes.

Q. (BY MS. GRAY) Okay. Where is that?

A. It's a little from the -- in Sheridan County, the Youngs Creek Road. It would be just a little bit east of where the Youngs Creek Road goes into Montana.

Q. Okay. So then --

A. Excuse me. West of the Youngs Creek Road. I'm sorry.

Q. Okay. I understand it's difficult to do directions without a map in front of you.

So keeping in mind what your district is, then, what I'm asking you is how much of your district border is on -- runs along an Indian reservation as opposed to not along an Indian reservation.

A. A little more than half. So I -- my district borders Montana for approximately 80 miles.

Q. Uh-huh.

A. 45, 50 of that borders the Crow Reservation.

Q. Okay. Okay. So at least half -- around half, [278] give or take?

A. Yes.

Q. Okay. So when you are investigating something that has happened on the part of the border that does not involve the Crow Reservation, do you -- do you have cross border issues? Do you have relationships with members of the Montana Fish & Game department?

A. Yes.

Q. So if you got an incident that's close to the border, you reach out to these officials of the State of Montana?

A. Yes.

Q. Okay. And that's pretty customary for you to do?

A. Yes.

Q. Okay. So -- and if you do have a question about jurisdiction between Wyoming Fish & Game and Montana Fish & Game, how do you work that out?

A. As far as if you have a violation, is that what you're asking me?

Q. Yes.

A. Well, essentially both of us -- in the event you have something like that, both of us kind of take note. We go back with the information we have and make sure that when we, you know, look at that information and plot it, [279] that we're in the correct state before any kind of enforcement action is taken.

Q. Okay. So if there's a question, you do some more investigation?

A. We do our homework to make sure we're in the right spot, yes.

Q. Okay. Good.

MS. GRAY: Your Honor, may I approach?

MR. LAROSA: Your Honor, may we approach?

THE COURT: Yes.

(Inaudible sidebar conference.)

MS. GRAY: May I have a moment?

THE COURT: Yes.

MS. GRAY: Your Honor.

THE COURT: Yes.

MS. GRAY: We would like to make an offer of proof, and I think that will require the jury to not be present.

THE COURT: All right.

MS. GRAY: May we do so?

THE COURT: You can do so.

All right. At this moment we have certain business to take care of outside the jury, so if you'll all rise, the jury will recess.

(The following proceedings were held [280] outside the presence of the jury.)

THE COURT: All right. Thank you. Be seated.

There is a sign outside the courtroom that there's no drinks in the gallery. If you would please take your beverages outside the courtroom, please. That applies to everyone. Any beverages?

MR. LAROSA: I'm sorry. I didn't hear the Court.

THE COURT: I was just instructing that there's a sign outside the courtroom not to bring beverages

inside the courtroom, and I just ask that be removed. Just our policy.

MS. GRAY: Your Honor, so I'm going to ask Mr. Shorma.

THE COURT: All right. Go ahead.

MS. GRAY: Thank you. It will be a little less formal. What we're doing here, Mr. Shorma, just asking you --

Q. (BY MS. GRAY) Okay. So the first document I'd like you to take a look at is -- I've got it marked as Defendant's Exhibit 149. Can you read the title of that document?

A. The Settlement Agreement Between the Crow Tribe of Indians and the United States to Resolve the 107th [281] Meridian Boundary Dispute.

Q. Okay. Can you please identify -- this document is notarized; is that correct? You know what a note -- notarization is?

A. Yes. I guess I can't see her stamp on it, but --

Q. You can flip the page.

A. Ms. Edwards. Okay. Yes.

Q. It's a notarized document?

A. Yes.

Q. Can you tell me who the signatories are, please? Just flip through.

A. Bruce Babbitt for the --

Q. What was his title?

A. I believe he was the chief and the Secretary of Interior at that time.

Q. Secretary of Interior?

A. Uh-huh.

Q. 1994. Do you remember when Mr. Babbitt was Secretary of Interior, or is that a little early for your time?

A. I do remember.

Q. Okay. So he was President Clinton's Secretary of Interior?

A. Correct.

[282] Q. So what's the secretary -- do you understand who the secretary -- the title of Secretary of Interior, who that is?

A. Yes.

Q. Okay. And can you tell me what your understanding is of that.

A. He oversees Bureau of Land Management, Fish & Wildlife Service. He oversees the Bureau of Indian Affairs.

Q. National Park Service?

A. National Park Service.

Q. All of the federal lands?

A. Not all of the federal lands.

Q. Okay. That's a good point.

So what lands -- what federal lands does he not oversee?

A. U.S. Forest Service.

Q. United States Forest Service. And who is that overseen by?

A. Department of Agriculture.

Q. So that would be the Secretary of Agriculture would be at the top of that --

A. I thought you meant like at the time.

Q. -- federal -- no, I'm not asking you who the Secretary of Agriculture was.

[283] A. I couldn't tell you who was in --

Q. No, I'm not asking you who the secretary is.

A. I don't know that.

Q. Okay. So what's the date of this document?

A. November 20, 1994.

Q. So it's more than 20 years old today?

A. Yes.

Q. Okay. And who is the second signatory?

A. Clara Nomee.

Q. And is that -- is Ms. Nomee identified by a title?

A. Yes. She is the chairman of the Crow Tribe.

Q. Okay. So we're talking about -- what's your understanding of the Crow Tribe as it compares to, say, the state of Wyoming, the state of Montana? Is it a sovereign entity?

A. It's a sovereign nation.

Q. Okay. You understand that --

A. Yes.

Q. You understand that it's part of your job duties?

A. Yes.

Q. Okay. So if -- you just testified that if you had a dispute between -- well, so Montana's a sovereign entity; is that correct?

[284] A. Correct.

Q. State of Montana.

State of Wyoming is a sovereign entity.

A. Correct.

Q. And so you just testified when you have a dispute between sovereigns -- you're aware of a dispute between sovereigns, you do further investigation to see whose jurisdiction it is, right?

A. That's correct.

Q. Okay. So what I want to ask you, when you did your investigation -- oh, let's -- oops. Sorry about that.

A. That's okay.

Q. Let's identify this -- well, here. Let's do a little bit more on this settlement agreement. So you see those between the United States and the Crow Tribe. And there's some things called Recitals. If you were reading this document just stand-alone, you had no lawyers standing behind you and all of that, would you understand what that term meant?

A. Recitals?

Q. Yes.

A. No.

Q. No. Okay.

So if you started looking at this document, [285] would you see they set out some facts about what the dispute is?

A. Yes.

Q. Okay. So there is a "whereas" that starts as a last sentence on page 1. Can you read that whereas? Can you read --

A. The very last one?

Q. Yeah.

A. Whereas the 1891 survey line straight to the west, creating a strip of land approximately 36,165 acres which was excluded from the Crow Indian Reservation, of which approximately 12,965 acres were included in the Northern Cheyenne Indian Reservation.

Q. Okay. And you understand from your job duties that the -- the border -- the eastern border of the Crow Reservation abuts with the western border of the Northern Cheyenne Reservation?

A. Yes.

Q. So you know what a settlement agreement is, right?

A. Yes.

Q. (Unintelligible.)

A. Okay.

Q. Okay. So there's another whereas clause that starts as the end of page -- right? Yeah --

[286] A. Right there.

Q. -- that last whereas clause, end of the page. I'm just going to ask you -- you can read that to yourself. Basically it says that the Crow Tribe has sued the United States regarding the boundary issues; is that correct?

A. Yes.

Q. And the whereas clause, that starts -- so it's the first sentence of the first full paragraph on page 3. Can you just read that first sentence of that whereas clause.

A. Whereas the United States contends that prior to the date of enactment of the Crow Boundary Settlement Act and the execution of this agreement, the legal eastern boundary of the Crow Reservation is the 1891 survey line.

Q. Okay. And so that's the United States taking a position in an official court document, a document that's agreed to by the Secretary of the Interior of the United States of America, correct?

A. Correct.

Q. Stating the position that the United States -- it is the position of the United States of America that the -- a border is what the legal survey says, is that right --

A. Yes.

[287] Q. -- what you read?

A. That's correct.

Q. So if you had read that -- well, let's -- let's -- one more thing. I'm just going to ask you to take a look at this.

So the settlement happened and -- let me ask you this. You testified about your training in maps and such. And you understand what acreage is, right?

A. Yes.

Q. The surveyor I think in one of the pieces you read was about 36,000 acres; is that right?

A. Yes.

Q. So if you've got that many acres, look through -- look at the -- there's a Exhibit A. Can you tell us what Exhibit A is to this document.

A. Undisposed of surface estate parcel number 1.

Q. And it's a -- it's an appendix that shows acreage for various parcels?

A. Yes.

Q. And so there's some that -- let's look. There's one here that's off. (Unintelligible) acres.

A. Yes.

Q. So what's an acre measure in miles? How -- how would one look at an acre being off and know, you know -- so if there's -- it's wrong by an acre, what does that [288] mean in mileage?

A. Well, one square mile is 640 acres.

Q. So if it's off an acre, it's off a mile?

A. No.

Q. Okay. So tell us -- can you --

A. I'd need a calculator.

Q. Do you have any -- so could you do that calculation and -- from here and determine -- if you looked at this document and see the acreage that you were talking about and you know there's that much of an error in the survey, okay? Would you have some doubts about whether that could be at least a mile off?

A. Well, looking at this, it's showing that it's in different sections in different lots. It's going to be going like this.

Q. I understand that. What I'm asking you -- I'm not asking you to say it is or it isn't. Would it raise questions for you about could be off a mile?

A. On this itself?

Q. Yes.

A. Yes.

Q. And probably more than a mile, right?

A. It doesn't appear to be.

Q. So --

A. I guess -- I mean, looking at the acreages, I [289] guess if it was a lot that was a foot wide --

Q. I'm not talking about just the lot. I'm talking about the -- so what you read was it jogs -- it was off, the -- the surveyor was off. What I'm asking is read this. You just said it raises some issues for you that it could be a mile. And I was just asking you, it could also be more than a mile off, given the amount of acreage.

A. Well, on parcel number 1, it wouldn't be --

Q. I'm not asking about parcel number 1.

A. Oh.

Q. I'm asking about the whole amount.

A. It could be.

Q. It could be.

A. Depending on the lot, yeah.

Q. That's what I'm saying. It raised some questions in your mind.

A. Yes.

Q. Okay. So there's a lot of verbiage here. I'm just going to -- one of the -- one of the pieces of this

settlement set up a -- a trust fund for the Crow Tribe into which the United States agreed to put mineral reserve amounts. And you understand what that -- how that would work, right?

A. Yes.

Q. What that is.

[290] Okay. So what the United States agreed to in this document is that they would turn over mineral payments that they -- well, let me ask you this. So you understand that when a mineral -- a mineral is a subsurface interest in a -- a surface land; is that right?

A. Yes. Are you talking about royalties --

Q. Yes.

A. -- is where you're getting --

Q. Yes. So, you know, what a -- a coal royalty or an oil & gas royalty.

A. Yes.

Q. Okay. So that's an amount of money that is paid by a nongovernmental entity, so like an oil company or coal company or an individual, who leases from a sovereign entity the right to extract that mineral and sell it. That's what it is?

A. That's correct.

Q. And so there's money that the coal company makes when it sells the coal to somebody else?

A. Correct.

Q. And part of that money that it makes when it sells is the royalty that it owes to -- let's say it was the United States that -- that granted the mineral

interest. It would owe that money to the United States; is that right?

[291] A. Correct.

Q. Okay. So if it was Wyoming that issued the mineral lease, the coal company would owe that money to Wyoming?

A. State of Wyoming, correct.

Q. And if it was the Crow Tribe that issued that mineral lease, that money would be owed to the Crow Tribe; is that right?

A. Correct.

Q. Okay. So this is -- part of the settlement the United States is agreeing to give the tribe mineral -- its mineral interests that are paid to it. Is that -- so is that a fair reading of that paragraph? I know it's a lot of legal --

A. Can you just give me a sec.

Q. Yeah.

A. Yes.

Q. And the United States agreed to put into that trust for the Crow Tribe because of the boundary error. How much --

A. 80 --

Q. -- in the dollars?

A. 85 million --

Q. 85 million?

A. -- dollars, yeah.

[292] Q. So my question is had you known about this document and you read it and you understood it and you talked to whoever you needed to talk to about

it, the fact that there was an $85 million dispute regarding the surveying of the eastern borderline, if you also knew that the survey of the southern borderline was carried out around the same time, similar ways of doing surveys, that would have raised some question in your mind, wouldn't it, regarding whether there was a dispute about this southern border?

A. No.

Q. That would not have raised it?

A. If there's $85 million at stake on a border that's not correct, why wouldn't they be fighting for that border?

Q. All right. Let's go on to the next document. Can you identify what this document is?

A. May 7, 2013, the Crow tribal legislature.

Q. Okay. So, again, we talked about you understand the Crow Tribe is a sovereign entity and it has a legislative body.

A. Uh-huh.

Q. And it's just like Wyoming or Montana, it issues laws and resolutions and things of that nature. Okay. So --

[293] MS. GRAY: Your Honor, I don't know any other way to do this other than have him review the document. So I know it will take a moment, but I'm going to have him review the document.

Q. (BY MS. GRAY) Just read it to yourself.

A. Okay.

THE COURT: While he's reading that, I was thinking are there some other documents you want to

just go ahead and make offers of proof on right now? I'll let you make a record.

MS. GRAY: I don't think through him.

THE COURT: Okay.

MS. GRAY: There are other witnesses we were prepared to bring on, but maybe they don't get to testify, given Your Honor's ruling, so...

This is just regarding his credibility and his oath.

Q. (BY MS. GRAY) Have you had a chance to review it?

A. Yes.

Q. And you did testify, I think yesterday, you're not a lawyer, right?

A. Correct.

Q. You don't have any training in law?

A. Correct.

[294] Q. So that was a lot of legal verbiage.

A. That is correct.

Q. Okay. So you said they'd be fighting for their rights. This document shows they're fighting and disputing -- fighting is probably not the right word, but they're disputing with the United States and asking the United States to look into this issue, right?

A. Correct.

Q. So you also said you reached out to the BIA in this case?

A. Correct.

Q. Right?

But you didn't reach out to the BIA regarding this issue -- you didn't do any investigation with the BIA with regarding this issue of the border dispute; is that correct?

A. That's correct.

Q. Okay. And if you had and you had spoken with the folks at the BIA in the surveying and boundary division of the Bureau of Indian Affairs, and you had found out that, in fact, BIA has been looking into this issue and setting up doing follow-ups about surveying issues and where and how a new survey should be carried out. You -- would that have played -- would that have played a role regarding the type of investigation you [295] would have done on this issue?

A. If I was in any way aware that the tribe was having some kind of survey work done, I would have investigated, but since I had no idea that this even existed, I did not.

Q. Okay. And you had no idea that -- that these documents existed because you just didn't look into this issue; is that right?

A. I would have imagined an issue like this, if it would have come forth, I probably would have seen it in the paper well before this instance. And if it had, I would have looked into it. But since there -- to my knowledge, the best of my knowledge, there was no dispute on where the boundary was, old boundary markers and boundary markers up until '95 was still on the same spot and had not been moved. I didn't investigate it.

Q. You didn't investigate it.

What's your level of -- so Mr. -- I think you testified Mr. Herrera reached out to you regarding the Crow -- the -- he wanted to work at your -- your team of wardens and your forensic capabilities and things of that nature, right?

A. Correct.

Q. So what did -- did you ever initiate and attempt to find out what the Crow tribal authorities believed [296] regarding the authority -- your authority and this issue about the border?

A. I guess --

Q. That wasn't very clear.

Did you make any attempts to reach across the Crow border and talk to people in charge over there?

A. Yes.

Q. Okay. And when -- was that to Mr. Herrera?

A. No.

Q. Okay. Any others?

A. His predecessors, yes.

Q. Okay. So you do have some level of -- of communication with the Crow Tribe?

A. Yes.

MS. GRAY: Okay. I think we're getting out of the realm now of the -- the offer of proof. Can I have a moment?

THE COURT: Yes.

Q. (BY MS. GRAY) Mr. Shorma, so you testified you didn't know about any of this, but now you do, right?

A. Correct.

Q. Okay.

THE COURT: Are you still in the offers of proof?

MS. GRAY: Yeah, I'm on offers of proof.

[297] Q. (BY MS. GRAY) So knowing this, does that affect your level of confidence that you testified yesterday regarding where the border is?

A. Yes. Or, excuse me, can you ask me the question again? I'm sorry. I --

Q. No. That's fine.

A. I blanked out for a sec.

Q. Knowing all this now --

A. Yes.

Q. -- would this affect your level of confidence that you testified to yesterday about?

A. Where the southern boundary is?

Q. Yes.

A. No.

Q. It would not?

A. It hasn't changed.

Q. What, your level of confidence has not changed?

A. No. The boundary is still where it's at. I don't have any I don't -- I don't think that even if I had seen this, I don't think it would influence anything about where the boundary is on the southern border.

Q. What I'm asking you is, would it influence -- would you have a reason to do further investigation into this issue?

A. If I had been aware of it, I would have looked [298] into it.

Q. Okay. And how would you -- would you have looked into it by handing this over to lawyers in your department?

A. I probably would have started locally, because obviously where this boundary we're talking about, it encompasses the Forest Service. I would have probably asked them if they had seen any of this.

Q. So you would have reached out to someone with the United States government?

A. That's where I would have started with, yes.

Q. Okay. And so if you had a similar understanding of the dispute between Wyoming and Montana, it would -- Indian reservation out of the equation, how would you have looked into that?

A. I probably would have started with -- I mean, the local assessor would probably be the first place I would have looked.

Q. And if it raised an issue in your mind that you should do some further investigation, you're going to turn it over to lawyers and ask what do I do here?

A. Yes.

MS. GRAY: I think I'm finished, Your Honor.

THE COURT: Okay. All right. We'll bring [299] the jury back in.

Unless, Mr. LaRosa, do you have -- I guess I should offer -- I can offer you an opportunity, since it was to his credibility as an offer of proof, if you want to --

MR. LAROSA: Well, I think the --

THE COURT: -- address it.

MR. LAROSA: -- the Court already ruled on the objection.

THE COURT: I did.

MR. LAROSA: And did say it was going to revisit --

THE COURT: It's still irrelevant. I'm still not going to allow the document in.

MS. GRAY: I understand that.

THE COURT: And she just wanted to make her record. So I allowed her to do that. All right. All rise.

(The following proceedings were held in the presence of the jury.)

THE COURT: Be seated.

Ms. Gray, you may continue.

MS. GRAY: Thank you, Your Honor.

CROSS-EXAMINATION (CONTINUED)

Q. (BY MS. GRAY) Mr. Shorma, move on to a [300] different issue here.

You remember yesterday you testified I think pretty close to the start of your testimony that it's the State of Wyoming and more specifically the -- your department, the Wyoming Game & Fish Department, that sets the open and closed seasons in Wyoming?

A. That's correct.

Q. Okay. And that's actually not the total picture for the entire state of Wyoming, is it?

A. Excluding national parks and national monuments.

Q. And other federal areas that we talked about here?

A. Yes.

Q. Okay. First, though, I think I'd like to go through -- yesterday you identified State's Exhibits 1 and 2. Do you remember that?

A. Yes.

Q. Okay. And so 1 is for 2013; is that right?

A. Yes.

Q. And 2 is for 2014.

A. Yes.

Q. And what's the date of the incident we're all talking about here?

A. January 18, 2014.

Q. Okay. And which of these two would apply to [301] that incident?

A. Kind of neither. If I could explain. We hadn't formulated our 2014 hunting seasons yet. We hadn't compiled the information to set a season in 2014 when the event took place. So this essentially did not exist.

Q. So "this" being State's Exhibit 2, the 2014 elk hunting regulations?

A. That's correct. We had not set a season when this happened.

Q. And it wasn't published?

A. It was not published.

Q. Okay. Now let's look at State's Exhibit 2013 [sic]. Yesterday you also identified an excerpt you took

out -- or Mr. LaRosa took out (unintelligible), right? That just looked at Hunting District 83 is it?

A. Uh, 38.

Q. 38. Sorry.

Okay. Can you look through this for a moment and tell me -- in fact, it's true, isn't it, that in 2013, there were open elk seasons in January in 2013?

A. In -- in --

Q. Not -- I'm just asking you in Wyoming, in all of the hunting districts in all (unintelligible) 2013 are in there, correct?

MR. LAROSA: Your Honor, I will object to [302] the relevance of a season in any other location other than the location at issue.

THE COURT: Overruled.

He can go ahead and answer.

Q. (BY MS. GRAY) Okay. Just flip through and tell me, are there open seasons in January 2013 in the state of Wyoming?

A. Yes.

Q. (Unintelligible.)

A. It's -- we have a couple of reasons. We have like cow-calf seasons, late cow-calf seasons.

Q. And there's hunting areas where there's bull elk seasons too, right?

A. No.

Q. Where you can shoot an antlered elk?

A. No.

Q. You don't think so in -- in January?

A. No.

MS. GRAY: All right. May I, Your Honor?

THE COURT: Yes.

Q. (BY MS. GRAY) Just by way of example, can you tell me Hunt Area 3, what the season is for any elk?

A. August 15th to January 31st, general license any elk valid south of U.S. Highway 26.

Q. So --

[303] A. I was aware of that -- it's uncustomary for us to hunt bull elk in January.

Q. Is it customary -- it's customary for the Crow to hunt in January, isn't it?

A. Correct.

Q. And in your interview -- and we can play the tape if it becomes necessary, but I think you testified you have a pretty good memory of what you talked with Mr. Herrera when you went up onto the Crow Reservation and interviewed him about this incident; is that right?

A. Correct.

Q. Okay. And in that interview, you said to Mr. Herrera we know I'm on your side, meaning the Crow Reservation side of the boundary. That's what you meant by "your side"?

A. That's correct.

Q. Okay. That you had no dispute that it would have been perfectly fine for Mr. Herrera to shoot the very same elk as long as it was on his side of the border?

A. Correct. They have no hunting seasons for elk.

Q. For elk. It's an open season in January.

A. Year-round.

Q. Okay.

A. To the best of my --

Q. So you agree that it's -- had he been on the [304] Crow Reservation, shooting that very same elk would have been perfectly legal?

A. Yes.

Q. And assisting others -- aiding others, whatever the language is of the -- the second count you made, that too would have been perfectly legal?

A. Correct.

Q. So in that secondary -- or that season we just looked at for -- as an example, for 3, that's open to January -- was open to January 31st. That's because elk are overpopulated in Wyoming, isn't it?

MR. LAROSA: I would object to relevance of that line of inquiry.

THE COURT: Sustained.

MS. GRAY: May I lay some foundation, Your Honor?

THE COURT: Yes.

Q. (BY MS. GRAY) What -- what -- don't you base season openings on the population of the animal in question?

A. Not necessarily.

Q. So what are things -- what are seasons based on? A. Well, some it depends on the license type. We had some licenses that open early and then go a long

time, essentially to address wildlife damage to private [305] property.

Q. Okay. So there's -- there's too many elk in place that are eating farmers' hay, you do something about that?

A. Yes.

Q. Elk are not an endangered species, that's right, isn't it?

A. Correct.

Q. And, in fact, they're a problem species in Wyoming in many places; isn't that true?

A. Problem species?

Q. Problem as in there's too many of them so they're going into places where they're just not wanted.

MR. LAROSA: I renew my objection. This is irrelevant to anything.

THE COURT: Overruled at this point.

A. Would you please ask the question again? I'm sorry.

Q. (BY MS. GRAY) No, no, no. That's not meant to you at all, Mr. Shorma.

So the -- one of the things that plays into setting seasons is that elk -- or that the animal in question is -- that it's -- there's -- there's too many for the area where you want them to be, where people can hunt for them, for example, and they've -- so they kind of [306] migrate onto private land and -- and eat haystacks or whatever it is that elk do.

A. In some instances, yes.

Q. Okay. And I think you -- you agreed that elk are not an endangered species, correct?

A. That's correct.

Q. And, in fact, in Wyoming, they're the -- your department is regulating and making decisions based on the -- the conclusion of the department that they want more elk to be hunted, not less elk?

MR. LAROSA: Same objection, Your Honor. And it was confusing and misleading.

THE COURT: I think the confusion is there. I think the question could be --

MS. GRAY: Let me lay some foundation for it, Your Honor.

THE COURT: It was a long statement.

MS. GRAY: Sorry, Your Honor. A moment?

MR. LAROSA: I would ask to approach, Your Honor.

MS. GRAY: I have the document I'm wanting --

(Inaudible sidebar conference.)

MS. GRAY: I apologize, Your Honor.

Q. (BY MS. GRAY) Mr. Shorma, I'm going to hand you [307] a document. Can you identify what that is?

A. This is the Wyoming Game & Fish Department's 2013 annual report.

Q. And you're a member of the Wyoming Game & Fish Department, right?

A. Yes.

Q. Do you review the annual reports?

A. Yes.

Q. And you understand they set policy of your department; is that right?

A. The Game & Fish Commission sets the policy, not the department.

Q. So this -- this contains (unintelligible) some of the policy for your department?

A. This is essentially an internal document.

Q. That talks about what?

A. What we did for 2013.

Q. Okay. Let's look and see if that's correct. Will you look at page 82, please. Are you there?

MR. LAROSA: Your Honor, I object to the admission of any of the contents of the document as irrelevant and confusing and misleading to the jury.

THE COURT: Ms. Gray, how is this relevant?

MS. GRAY: I was just about to ask him -- I'm almost finished with this, Your Honor. I just have [308] some objectives and that's policy of the department.

THE COURT: I'm going to sustain the objection. I don't know how this is relevant to our issue, what the department did when, we are here on what Mr. -- or Game Warden Shorma did.

MS. GRAY: Well, what I'm asking is one protocol (unintelligible) how the department manages the elk in Wyoming. Mr. Shorma can testify to that. The department tells its game wardens (unintelligible) -- well, let me ask him that question.

Q. (BY MS. GRAY) So what the department instructs you to do in terms of what's management situations are and how they manage all these elk

(unintelligible) the department gives direction how it wants the elk herds to be managed, do you pay attention to that in the decisions you make as a game warden?

A. Well, each hunt area, depending on where it is, is managed specifically towards its own goals.

Q. I understand, Mr. Shorma. What I'm saying is you pay attention to what your department tells you is its objectives and what its management positions are, correct?

A. We manage towards what -- like for the areas that we're responsible for, we manage those, correct.

Q. Correct. You manage those how the department lays out the objectives for you to manage?

[309] A. Well, it's not -- it's not -- if you're asking me like if my superiors ask me to manage in a specific way, they do not.

Q. And my question is do you make your decisions as a game warden, pay attention to what the department tells you are its management --

A. I guess I'm -- I guess I'm not following here, because --

Q. Let me ask you -- so this document says overall the department continues to manage --

MR. LAROSA: I object to reading the contents of the document.

THE COURT: Sustained.

MR. LAROSA: That's contrary to the Court's ruling.

THE COURT: He's answered your question, so let's move -- move on.

MS. GRAY: Thank you, Your Honor. I'll take that back.

MR. LAROSA: Permission to approach.

THE COURT: Yes.

(Inaudible sidebar conference.)

Q. (BY MS. GRAY) Mr. Shorma, you testified yesterday, I believe -- you said you're a warden of the Department of Game & Fish. It's Game & Fish, right? Not [310] Fish & Game?

A. Correct.

Q. Okay. Is it true you're a warden of that department?

A. Correct.

Q. And that makes you a law enforcement officer?

A. Correct.

Q. And I believe you testified that you're actually -- the term you used is peace officer; is that right?

A. Correct.

Q. Okay. So what is a peace officer?

A. Peace officer is someone who's essentially given the authority from the state legislature to enforce the statutes and regulations of the state of Wyoming.

Q. And do you receive -- you received some training, didn't you, from the department regarding what authority you'd been given; is that correct?

A. Correct.

Q. Okay. What kind of training -- or -- yeah, training did you receive on that issue?

A. I attended the same 13-week law enforcement academy that every deputy, patrolman, police officer, highway patrolman attends. We have essentially in-service training every year that we all are required to attend for [311] legal updates.

Q. And you discussed yesterday, I believe, when you went to do the interview with Mr. Herrera up at the Crow Reservation, that -- I believe you said -- you said it, although it may have been that Mr. Ehlebracht said -- that you had no authority there; is that right?

A. We informed Mr. Herrera that we had no authority on the Crow Reservation.

Q. And let me ask you -- so I'm going to hand you a stack of documents.

MR. LAROSA: Permission to approach, Your Honor.

THE COURT: Yes.

(Inaudible sidebar conference.)

Q. (BY MS. GRAY) Mr. Shorma, I'm going to hand you this document which we marked as Defendant's Exhibit 121. Can you take a look at that document (unintelligible).

MS. GRAY: Your Honor, may I have a minute (unintelligible)?

THE COURT: Yes.

Q. (BY MS. GRAY) Are you ready, Mr. Shorma, or -- okay. Can you tell me what that document is?

A. Just essentially an affidavit of probable cause.

Q. In this case?

[312] A. Yes.

Q. So you filed this with Her Honor in this case?

A. Yes. I worked with Mr. LaRosa on this.

Q. Okay. Can you flip to the back, please, where there's some legalese that says further the affiant sayeth not, and there's a signature line there. Whose -- whose signature line is that?

A. It's mine.

Q. It's yours. And you signed that, correct?

A. Correct.

Q. And what's your understanding of when you give an affidavit? Are you swearing under the laws of Wyoming that your testimony in the affidavit is truthful?

A. Yes.

Q. And you understand you're subject to the penalties of perjury if it's not?

A. Yes.

Q. So, Mr. Shorma, this affidavit is numbered in Roman numerals. I assume you're conversant in Roman numerals?

A. Yes.

Q. Okay. You see there III?

A. Yes.

Q. Okay. So as you testified yesterday the charge in this case is for hunting out of season; is that right?

[313] A. His charge?

Q. The charges that Mr. Herrera is facing in this courtroom; therefore, shooting elk out of season; is that correct?

A. His charge is taking an antlered animal during a closed season or without a license.

Q. Okay. Now, you didn't testify yesterday at all about license.

MR. LAROSA: Your Honor, I'm going to object. And I would ask to approach, Your Honor.

THE COURT: All right.

(Inaudible sidebar conference.)

Q. (BY MS. GRAY) Mr. Shorma, you testified yesterday regarding your interview with Mr. Herrera up on the Crow Reservation; is that correct?

A. Correct.

Q. Did you make a recording of that interview?

A. I did.

Q. Did you -- have you listened to it recently?

A. Yes.

Q. How is the audio quality on that?

A. It's got some muffling. At times it's really good and at times it's kind of muffled.

Q. Yeah. It sounds like maybe it's under clothing or something. Were you wearing a wire?

[314] A. It was in my pocket.

Q. It was in your pocket.

A. It was in this pocket of this vest.

Q. That vest.

Did you tell Mr. Herrera that you were taping him?

MR. LAROSA: I would object to the relevance of the question.

MS. GRAY: Your Honor, the relevance of the question is on -- on asking Mr. Shorma who was acting, he's told us, outside of his jurisdiction, wanted to do some follow-up questions regarding did he understand what the law is in the jurisdiction he was making a recording.

THE COURT: Counsel approach.

(Inaudible sidebar conference.)

Q. (BY MS. GRAY) Sorry for the interruptions, Mr. Shorma.

A. That's okay.

Q. Let's get back to this.

So in your testimony yesterday, Mr. LaRosa asked you if Mr. Herrera admitted he was at -- that he knew at the time he was engaged in the act we're all here talking about, whether he admitted he knew he was in Wyoming then, and he expressed some doubts about that. Do you remember that?

[315] A. He -- showing Mr. Herrera the map when we pointed out the position where the elk carcasses were found, we told him you probably knew you were in Wyoming and that the fence was the state line, and he replied, yeah, looking at it.

Q. So what he was saying is you showed him some documents, and at that point he said to you, well, okay. Maybe I was in Wyoming. But he didn't -- did not admit that he knew he was in Wyoming at the time of the shooting of the elk, right?

A. Not during that interview.

Q. Okay. And, in fact, he's never admitted that, has he? That you're aware of.

A. Not to me, but to the --

Q. Okay.

A. -- Billings Gazette --

MS. GRAY: Your Honor, that's hearsay. Objection. It's beyond the scope of the question.

THE COURT: All right. We'll strike the -- disregard the last comment of the game warden.

Q. (BY MS. GRAY) Okay. So in your interview, Mr. Herrera told you that he started hunting in Montana, right? Or actually on the Crow Reservation that day, early in the morning he and his family and friends were in Montana, in the exterior boundaries of the Crow [316] Reservation when they began their hunting trip; is that right?

A. Correct.

Q. Okay. And he also told you in your interview that he never intended to go into Wyoming that day. That's correct, isn't it?

A. I'd have to refer to my notes. I don't recall him saying that.

Q. So are your notes the interview or are they the -- the tape or do you have written --

A. My written notes. Just my written --

MS. GRAY: Your Honor, can we take a moment so he can review his notes?

THE COURT: Sure. He can --

Q. (BY MS. GRAY) Mr. Shorma, did reviewing your notes refresh your recollection on this issue?

A. Yeah. I'm sorry. Can you rephrase the question so I can make sure I answer it correctly.

Q. Okay. So during the interview, Mr. Herrera told you they didn't set out or intend to go into Wyoming; is that correct?

A. Correct.

Q. And you believed him, right?

A. Correct.

Q. And you believed Mr. Herrera when he -- when you [317] interviewed him and you had your discussion that he's not one of the problem poachers you were worried who you're investigating regarding the lopping off of the heads of elk along the Montana-Wyoming border?

A. I'm sorry. I didn't -- that first --

Q. All right. When you -- you, in your interview, you showed him photos, correct?

A. Correct.

Q. And you talked about what you found so frustrating when -- in your investigation regarding those photos; is that correct?

A. Correct.

Q. And those photos essentially show various elk carcasses with the heads cut off; is that right?

A. Correct.

Q. And so the meat was left to rot, essentially, and someone took the heads to do something with the -- with that alone?

A. On some of them. Some had a little bit like the backstraps removed, but it was kind of a mix.

Q. What's a backstrap?

A. Essentially, it's a section of meat that runs along the spine on both sides.

Q. These are the small pieces of meat you can take without the burden that goes into actually field dressing [318] and quartering an elk?

A. I guess it depends on how much you take. It's not a cumbersome -- well, if you take the whole thing, they're probably, I don't know, the length of the elk's back from between their shoulders to their rump.

Q. Okay. So but that's -- well, let me ask you this. Does the -- the department have a law against what -- I think you used the term "waste" yesterday?

A. Correct.

Q. Yeah. What is waste?

A. It's allowing any edible portion to essentially needlessly go to waste.

Q. Okay. So if you take a backstrap only and leave the rest of the animal, is that waste?

A. Yes.

Q. And so -- actually, let's look at that law, if you don't mind, so you can tell me what the definition of waste is.

MR. LAROSA: Your Honor, I would object to this. That is not a statute that is at issue here. And I don't believe it has any relevance to the matter.

THE COURT: I'm going to sustain it as far as the statute. He can generally define it as to what he understands waste to be, but not -- not commenting on the statute.

[319] Q. (BY MS. GRAY) Okay. What do you understand waste to be?

A. As far as like what the -- essentially, we have edible -- what is considered edible portion. It's the four quarters on the front: shoulders to the knee; hind quarters down to hock. It's the meat along the spine, including the backstraps and tenderloins.

Q. Okay. And the head is not an edible portion?

A. That's correct.

Q. Okay. And so in your interview, you actually complimented Mr. Herrera for the work they did. Is it called quartering? What does one do when one dresses an elk in a field?

A. It's called a quartering.

Q. So that's good enough? I can ask you that?

A. Uh-huh.

Q. You complimented him on the quartering and the taking -- packing out of the meat that they did do with these elk; is that correct?

A. That's correct.

Q. And you believe that was done correctly as far as the issue goes, not where he was, but if, in fact, he had had a license and a tag that you considered appropriate, he would have complied with the rest of Wyoming's laws regarding how the elk was taken and packed [320] out.

A. Based on what he said he took. My only question would have been the tenderloins, because there was no evidence that they had been removed from the animal prior to -- prior to my finding it.

Q. What's a tenderloin?

A. Essentially, on the -- there's -- if you look at the animal, the tenderloins kind of lie above the kidneys

on the interior of the -- kind of at the junction of where the rib cage ends and the spine continues towards the pelvis.

Q. And do you have any evidence the tenderloins were not taken?

A. When you cut them out, you cut bone. I mean, your knife will hit bone when you remove them.

Q. And you showed us bone marks --

A. That was on the backstraps. That would have been on the -- let's see -- the other side of the spinal process.

Q. So you and Mr. -- Mr. Herrera had a colloquy in your interview, back and forth, about how important it was to make sure that -- that the meat was used, correct? Do you remember that?

A. Correct.

Q. And you told him I really applaud you guys [321] for -- for, you know -- I understand you're hunting for meat and you took this meat home, and it was a lot of work to get that meat back out of the mountain where they --

A. I believe I told him I applauded -- I didn't say anything about them hunting for meat. I just applaud the fact that they took what it appeared they were supposed to --

Q. Okay.

A. -- under Wyoming law.

Q. So it's true, isn't it, that Mr. Herrera has license or permit to hunt elk on the Crow Reservation? You understand that?

A. To the best of my knowledge, I don't believe a permit is needed if you're an enrolled tribal member.

Q. Okay. You couldn't hunt without a -- a Crow tribal permit legally on the Crow Reservation, correct?

A. You can't hunt elk or deer on the Crow tribal at all.

Q. Okay.

A. There's no permitting system for nonmembers, to the best of my knowledge.

Q. To the best of your knowledge. People do, other than tribal members, hunt on the Crow Reservation, don't they?

A. Antelope and game birds and turkeys and bears, [322] yes.

Q. Okay. And it's licensed by the Crow Tribe?

A. Correct.

Q. Okay. And you understand he can hunt elk legally on the national forest in Montana?

MR. LAROSA: I'm going to object to relevancy to this line of inquiry.

THE COURT: Sustained.

Q. (BY MS. GRAY) Are you aware -- well, I don't think there's been any testimony on that yet. We'll save that for later, Mr. Shorma.

MS. GRAY: I'm sorry, Your Honor. One moment.

Q. (BY MS. GRAY) Mr. Shorma, you testified yesterday that this -- the incident we're here talking about took place on the Bighorn National Forest; is that right?

A. That's correct.

Q. And you received training as a peace officer regarding jurisdiction; is that right?

A. Correct.

Q. What's your understanding of what your authority is within the confines of the Bighorn National Forest?

A. It's no different than -- I mean, it's the same as if I was off.

[323] Q. So --

A. I don't enforce, essentially, Forest Service laws. But all Game & Fish laws I enforce on the Bighorn National Forest.

Q. Okay. So your understanding is you enforce Wyoming laws on federal property, but not federal laws on federal property; is that right?

A. That's essentially correct.

Q. Okay. So if federal law and Wyoming law conflict, what's your understanding and training as to which law essentially trumps the other?

A. Federal law supersedes state law.

Q. So if you were aware of a federal law that allowed Mr. Herrera to hunt at that time, on that day, in the Bighorn National Forest, you would not have written the citation; is that correct?

MR. LAROSA: I'm going to object to the question. It calls for a hypothetical. As much as it's a question, it's irrelevant.

THE COURT: It is also speculative, so it is irrelevant, and that's sustained.

MS. GRAY: I have no further questions. Thank you, Mr. Shorma.

THE COURT: Mr. LaRosa?

MS. GRAY: Oh, Your Honor, I do reserve [324] right to call him back in our case.

THE COURT: He is under subpoena, yes.

MR. LAROSA: Ms. Gray.

MS. GRAY: I'll come get it. Thanks.

REDIRECT EXAMINATION

Q. (BY MR. LAROSA) Mr. Shorma, Warden Shorma, the -- Ms. Gray asked you a series of questions about, I guess, a system in place on the Crow Reservation involving game and fish?

A. Correct.

Q. You -- I'm showing you State's Exhibit 7. I've shown that to you previously, haven't I?

A. Yes.

Q. And that would be the exhibit that Mr. Herrera gave you, is it not?

A. That's correct.

MS. GRAY: Your Honor, Mr. LaRosa has not given me a copy of what he's --

MR. LAROSA: I showed it to you yesterday.

MS. GRAY: Well, I don't have a copy of it.

MR. LAROSA: Well, I can get you a copy.

Q. (BY MR. LAROSA) Just take a moment to examine that document.

MR. LAROSA: (Unintelligible.)

MS. GRAY: Are you going to ask him [325] questions about what's in here? Because I just need to be able to follow along on.

MR. LAROSA: I'm asking him one question about what's in there.

MS. GRAY: Okay. I'll reserve until -- we don't have -- I don't have a copy of that right now, Your Honor, so I'm just going to reserve objection, if I have any, until I can actually see the questions that Mr. LaRosa asks.

MR. LAROSA: And this is the page that -- this was provided to you in email, so you do have it.

MS. GRAY: I'm sure I have something.

Q. (BY MR. LAROSA) This is the booklet that he wrote the email address down and his phone number, correct?

A. Correct.

Q. And if you could examine that document, because this does to some degree the -- the system in place on the reservation, the regulations themselves?

A. Correct.

Q. Is there a part of that document that discusses the responsibility of hunters to know their location on the law?

A. There is.

MR. LAROSA: State would move the admission [326] of State's Exhibit 7.

THE COURT: Ms. Gray?

MS. GRAY: Your Honor, the only real hesitation I have is we actually have an exhibit that is marked

that was introduced to Your Honor earlier in this case that is the official Crow game code. I'm not sure what this booklet is, and so I -- it's --

THE COURT: I'll admit it. It's already been testified -- I mean, the game warden's testified how he received it.

MS. GRAY: Okay.

THE COURT: Where he --

MS. GRAY: Okay. As long as that's the understanding.

THE COURT: And it is a document that speaks for itself.

(State's Exhibit No. 7 received in evidence.)

MS. GRAY: Okay.

Q. (BY MR. LAROSA) The document has a symbol of the Crow Tribe on it?

A. Yes.

Q. All right. Do you see the bolded paragraph where the responsibility of hunters to know their location is contained in that document?

[327] A. Yes.

Q. Can you please read that paragraph?

A. Hunters, it is your responsibility to know where you are, to know who owns the land, to know what access restrictions apply, and to know the location of the exterior boundaries of the Crow Indian Reservation.

Q. Thank you.

MS. GRAY: (Unintelligible.)

Q. (BY MR. LAROSA) You were asked some questions about the fence. Yes?

A. Yes.

Q. To your knowledge, are there practical reasons why sometimes you can't put a fence where it precisely should be?

A. Yes.

Q. Could -- can you explain that?

A. There are many landowners, just due to the terrain or topography, they're unable to build a fence on a property boundary. There's also some instances where I guess there will be variations in the fence to help, at least, like range stock fences to allow landowners an easier time to move livestock into areas -- new pastures or different areas. So they'll have wings and kind of variations in the fence that will allow them to easily, you know, let a horse or vehicle move their animals from [328] one pasture to another.

Q. Okay. The place on the map where you showed the fence is quite a bit away from the border line. Is there a reason why that took place? To your knowledge, just looking at the terrain.

A. From the -- from the -- from how the -- that fence lies, it would be an easy way to.

MS. GRAY: Your Honor, I'm going to object to foundation purpose to this line of questioning.

MR. LAROSA: I'll withdraw that question. I'll take the --

Q. (BY MR. LAROSA) Does any part of your job involve -- do you write the laws or do you enforce them?

A. I enforce them.

Q. When you contacted Mr. Herrera, you were asked some questions by Ms. Gray whether you had reached out to tribal officials as you have to other law enforcement agencies in other jurisdictions, and you said you had done that previously with tribal officials. Do you believe that's what you were doing when you met with Mr. Herrera?

A. That's correct.

MR. LAROSA: May we approach, Your Honor?

THE COURT: Yes.

(Inaudible sidebar conference.)

MR. LAROSA: Those are all the questions I [329] have, Your Honor.

THE COURT: All right. You may step down.

MS. GRAY: You're finished?

MR. LAROSA: Yes.

MS. GRAY: (Unintelligible).

THE COURT: All right. Why don't we --

MS. GRAY: Oh, Your Honor, I had a followup.

MR. LAROSA: I would object to (unintelligible).

THE COURT: You can bring that back -- just subpoena him back.

MS. GRAY: Pardon me?

THE COURT: If you wish to cross-exam -- direct exam, you can do that.

MS. GRAY: This is just a follow-up on one of the questions.

THE COURT: Court procedure is you get one chance at the apple.

MS. GRAY: Oh, so there's no re --

THE COURT: That's correct.

MS. GRAY: Okay. We'll ask him the question when we bring him back.

THE COURT: All right. You may step down. * * * [333] case?

A. Warden Dustin Shorma.

Q. Did you help him with his investigation?

A. Yes, I did.

Q. What did you do?

A. I did several things for the investigation. I helped him locate the sites of the -- where the elk were killed. I assisted in drafting search warrants that we did on Facebook. I conducted interviews with Warden Shorma for suspects in this investigation. And I also collected evidence and took it to the Wyoming State -- to the Wyoming forensic lab in Laramie for processing.

Q. Approximately what time -- when in 2014 did you get involved?

A. Approximately February 2014.

MR. LAROSA: Just one second. (Unintelligible.)

Q. (BY MR. LAROSA) When you became involved, did you become aware of -- show you State's Exhibit 8 -- the photographs taken -- that were found on the Monster Muleys forum?

A. Yes, I did. I was shown these photographs. And I also went to the monstermuleys.com website to view these photographs.

Q. Okay. And did you do any -- before you said you * * *

[337] Q. All right. The -- at any time -- and -- and when the evidence was stored, were seizure tags on them?

A. Yes. We attached seizure tags at the sites. And when we brought them to the regional office, you know, always do that for evidence and chain of evidence, attach seizure tags to them.

Q. All right. On any occ -- did you happen to sign -- sign the six items out of evidence?

A. I did.

Q. And why did you sign them out of evidence?

A. To transport them to the University of Wyoming, our forensic lab, for analysis.

Q. All right. So -- so the -- all three pelvises were taken out?

A. Yes. All three pelvises and all three elk heads were taken out of the freezer. They were packaged up, and then I took them to the -- to the lab personally. I drove them down personally to the lab.

Q. All right. When you did that, did they retain their -- their evidence tag and seizure tag for identification purposes?

A. Yes, they did.

Q. The -- when -- and where is the lab located?

A. It's right at the University of Wyoming campus, in the science building. * * *

[343] that the report?

A. Yes. This is the report.

Q. You testified at the outset that you applied for some Facebook warrants for -- did you say Clayvin Herrera, Ronnie Fisher, DL Singer?

A. Yes. That's correct.

Q. The -- when did you -- let's discuss Ronnie Fisher. When did you apply for a search warrant for his Facebook records?

A. August 21, 2014.

Q. All right. And what period of time were you interested in getting the records from Facebook for?

A. January 1, 2014 up to that date, August 22, 2014.

Q. Does that include the dates when you saw the Facebook posts you identified in State's Exhibits 7 and 11?

A. Yes, it does.

Q. Do you have to apply for a search warrant?

A. Yes, I had to apply for a search warrant.

Q. And who do you apply to?

A. What's that?

Q. Did you --

A. Sorry.

Q. Who gives permission for a search warrant to be [344] executed?

A. A judge --

Q. All right.

A. -- or magistrate.

Q. Did a judge or magistrate give you permission?

A. Yes.

Q. And what procedure did you follow?

A. I followed the procedure for Facebook. You have to submit it electronically to a secure website for Facebook. I have to contact them. Then they may have me electronically send the warrant to them, and then they conduct the search of those records and then provide me a download of those records.

MS. GRAY: What exhibit number?

MR. LAROSA: It will be 31.

MS. GRAY: Okay.

Q. (BY MR. LAROSA) And did you subsequently get the download and examine it?

A. Yes, I did.

Q. How much information was provided in that download?

A. On Ronnie Fisher's -- it was a lot. It was over 500 pages.

Q. Okay. And did you examine the pages?

A. Yes, I did. * * *

[356] THE COURT: All right. And these are basically for offers of proof?

MS. GRAY: To put on offers of proof.

THE COURT: Mr. LaRosa, do you have any objection to both of them just staying in the courtroom while we do this?

MR. LAROSA: No.

[357] THE COURT: Okay.

MS. GRAY: So, Your Honor, would you prefer I put them on the stand and ask them what they're ready to testify to?

THE COURT: Yes.

MS. GRAY: Okay. So we would call Tim McCleary.

THE COURT: All right. Mr. McCleary, come around here to the stand, please. Would you raise your hand to be sworn.

(Witness sworn.)

TIMOTHY MCCLEARY,

called for examination by Defendant, being first duly sworn, testified as follows:

THE COURT: Please be seated.

DIRECT EXAMINATION

Q. (BY MS. GRAY) So would you state your name for the record, please?

A. Timothy McCleary.

Q. And have you filed an affidavit in this proceeding?

A. I have.

Q. And included in that affidavit is a curriculum vitae setting out your experience and your education and your background that you offered as part of why you were [358] available to testify as an expert in this case; is that right?

A. That's correct.

Q. Okay. So one of the things that you discussed in your affidavit is oral history of Indian peoples; is that correct?

A. Yes.

Q. And you discuss in there that oral history is a reliable source of information; is that correct?

A. That's correct.

Q. Okay. And -- so if you were allowed to testify today -- well, let me back up.

You're aware that there's oral history regarding the dispute about the liability or the accuracy of the measuring of the southern border of the Crow Tribe?

A. I am aware of that, yes.

Q. Okay. And so if you were allowed to testify here today, you would offer evidence regarding the reliability of such oral history?

A. Yes, I could.

Q. And you're otherwise available to testify consistent with your affidavit that's on file with the Court?

A. Yes.

MS. GRAY: I think that's it for [359] Mr. McCleary, Your Honor.

THE COURT: All right. Do you have any questions at all you want to ask?

MR. LAROSA: No, Your Honor.

THE COURT: All right. Thank you. You may step down.

THE WITNESS: Thank you.

THE COURT: And just for the record, as to the affidavit of Mr. McCleary, the Court's already ruled that the affidavit does not have any relevance as to the issues of fact in this case. Thank you.

MS. GRAY: We understood that, Your Honor.

THE COURT: Yes. I'll just make it clear. * * *

[371] document that Mr. LaRosa --

MR. LAROSA: Can we do this at sidebar, if it's going to be extended?

MS. GRAY: It's not going to be. Just a statement of fact. And what we suggest, for clarity and fairness, the entire statement of the facts be put in, Your Honor.

THE COURT: And, again, that objection is overruled and the pertinent amount of information is relevant. The remainder of the information contains irrelevant information.

MS. GRAY: And we would also like to renew our foundation objection.

THE COURT: Right. So noted.

32 will be admitted.

(State's Exhibit No. 32 received in evidence.)

REDIRECT EXAMINATION

Q. (BY MR. LAROSA) Mr. Adell, I'm going to give you State's Exhibit 32. I'd like you to turn to page 10. I would like you to read everything on page 10 and 1 that you can.

A. Statement of the facts. Herrera is an enrolled member of the federally recognized Crow Tribe. He resides at St. Xavier, Montana, which is located on the Crow [372] Reservation. In January 2014 Herrera, a deputy game warden for the Crow Tribe, and several other tribal members decided to hunt for elk on the Crow Reservation lands, intending to return with meat to help feed their families over the winter months. Petitioner and his fellow tribal hunters

spotted several elk on the reservation in the vicinity of Eskimo Creek and tracked them on foot through the snow. At some point elk, with the tribal hunters in pursuit, apparently crossed over the Montana-Wyoming border and into the Bighorn National Forest. Three elk were shot, quartered and packed out of the mountains on the backs of the tribal hunters, who later distributed the elk meat among their families and other tribal members.

You want me to continue with the other parts?

Q. Just to be clear, if there's anything else, please read it.

A. It's on page 11 now. Okay. Some of these facts are not in the record. Herrera certifies that if such a hearing were to be held, these facts would be established. While Herrera is not certain the elk were shot in Wyoming rather than on the Crow Reservation, for purposes of his appeal, he does not contest that the elk were taken on the Bighorn National Forest.

MR. LAROSA: I have no more questions at * * *

[388] THE COURT: Thank you. Be seated.

Ms. Gray.

MS. GRAY: Thank you, Your Honor.

We -- the defense would recall Mr. Shorma to the stand.

THE COURT: Okay. You're still under oath.

DUSTIN SHORMA,

called for examination by Defendant, having affirmed, testified further as follows:

DIRECT EXAMINATION

Q. (BY MS. GRAY) Welcome back, Mr. Shorma.

A. Good afternoon.

Q. So I've just got follow-up questions from your testimony earlier. So after you testified you had the interview of Mr. Herrera up in the Crow Reservation, you issued two citations; is that correct?

A. That's correct.

Q. Okay. And one of the citations you issued was for aiding and abetting; is that correct?

A. That's correct.

Q. Okay. And you charged that because Mr. Herrera helped pack out the other elk, the meat of the other elk that he did not shoot, correct?

A. I guess if I answered one way or the other, it wouldn't be completely correct. Mr. Herrera not only [389] helped, you know, pack out the meat, but he also facilitated the hunt. He was kind of the organizer to bring everybody together to hunt.

Q. So where did that facilitation you just described occur?

A. In talking with, you know, other individuals that were hunting with him, it was a -- a text message.

Q. And it happened on the Crow Reservation, correct?

A. The text message?

Q. That the -- the conduct of sending the text message were -- otherwise con -- contacting the others to go on a hunt happened on the Crow Reservation.

A. I don't know. I don't know where he was when he sent the tex

Q. Okay. Did you see a text message?

A. I did not.

Q. So other than -- than that, which you said bringing the party together, is there anything else that supports the aiding and abetting citation that you wrote?

MR. LAROSA: I will object. I believe this calls for a legal theory of guilt here. That's inappropriate.

THE COURT: Sustained.

Q. (BY MS. GRAY) Let's see how I can ask that.

[390] So at the time you write a citation, you know what you're thinking, why you're issuing that citation. I mean, you decided in your mind it's appropriate, under your understanding of your authority, to issue a citation; is that right?

A. Yes. Citations are issued based on probable cause.

Q. And they're charging documents, like -- well, do you know what a charging document is?

A. Yes.

Q. Okay. And so is a citation a charging document?

A. Yes.

Q. And those are the charging documents at issue here. There's no information or indictment or anything of that nature; is that right?

A. That's correct.

Q. So what you thought at the time was that it was appropriate to issue a citation for aiding and abetting because Mr. Herrera brought the hunt party

together. I think your term was facilitated the hunt at the start of the day -- or that -- the evening before. And then that he helped pack out -- so possessed and transported the elk out from where they were shot?

A. He was an active participant in the taking of the elk as well as the packing out.

[391] MS. GRAY: Okay. May I have a moment, Your Honor?

THE COURT: Yes.

Q. (BY MS. GRAY) So, Mr. Shorma, you talked about a text message. And just to be clear, did Mr. Herrera say anything in his interview about a text message?

A. No.

Q. So -- and you never saw a text message?

A. That's correct.

Q. And so you're not aware of any evidence or information that there was anything in the text message saying let's go to Wyoming to hunt?

A. That's correct.

MS. GRAY: That's it, Your Honor. Thank you.

THE COURT: All right.

MS. GRAY: And we release Mr. Shorma.

THE COURT: Okay.

MS. GRAY: He can be released from his subpoena as well.

THE COURT: Just a moment. Any cross-exam?

MR. LAROSA: I have some cross-examination.

THE COURT: All right. We'll allow some.

MR. LAROSA: Thank you.

CROSS-EXAMINATION

[392] Q. (BY MR. LAROSA) When you -- I want to discuss what you mean by an active participant. Based on the information Mr. Herrera told you. Did he acknowledge that the individuals he named as being with him were with him on a hunt?

A. Yes.

Q. All right. And did he -- in his statements to you, isn't it true that he basically told -- described to you the process of how they got where they were, followed the elk, went together in places and collectively engaged in shooting at elk?

A. Yes.

MR. LAROSA: Thank you. Those are all the questions I have.

THE COURT: You may redirect based on this.

MS. GRAY: That's it for us, Your Honor. (Unintelligible.)

THE COURT: All right. You may step down.

Your next witness.

MS. GRAY: Your Honor, may we approach a minute?

THE COURT: Yes.

(Inaudible sidebar conference.)

THE COURT: Ladies and gentlemen of the jury, at least you're getting your leg exercises this * * *

[395] Ms. Gray, call your next witness.

MS. GRAY: Thank you, Your Honor. We'd call Mr. Clayvin Herrera.

THE COURT: Mr. Herrera, raise your right hand.

(Witness sworn.)

CLAYVIN HERRERA,

called for examination by Defendant, being first duly sworn, testified as follows:

THE COURT: Please be seated. And as you know, watch the chair.

THE WITNESS: Yeah, watch out for the chair.

DIRECT EXAMINATION

Q. (BY MS. GRAY) Mr. Herrera, can you state your name and address for the record, please?

A. Clayvin Herrera. I reside at 60 Soap Creek Ditch Road, St. Xavier, Montana.

Q. And is St. Xavier, Montana on the Crow Reservation?

A. Yes, it is.

Q. So, Mr. Herrera, you've been sitting, listening to testimony about you. Now is your chance. I'm going to ask you some questions to try and facilitate you telling your side of the -- what happened here to the jury. Okay?

[396] So, first, tell us about your educational background.

A. Got some college out of the way at the University of Wyoming. And I guess would education be training on the job, I guess?

Q. Sure. We can get -- so you're -- what did you study at the University of Wyoming?

A. Major in criminal justice and minor in American Indian studies.

Q. Okay. And did you get your degree?

A. No, I didn't.

Q. And why did you stop short of your degree?

A. I started a family.

Q. Okay. And is your -- does -- tell us about your family.

A. Well, it consists of me and my three girls.

Q. Are your three girls in the courtroom?

A. Yes, they are.

Q. You want to point them out?

A. We've got Sharrell on the left. Andrea, we call her Toots, in the middle. And Brianna on the right, but she goes by Nanna.

Q. And who's that sitting next to Brianna?

A. My mother back there. Cheryl.

Q. Okay. Is your sister there too?

[397] A. I can't see. Yep. There she is. My sister Adrienne. And my other sister Brenna.

Q. One of those sisters was the one who appears in the exhibits?

A. Yeah.

Q. Let me get that exhibit.

A. I'm surrounded by girls.

Q. So State's Exhibit -- State's Exhibit 8. Look at that. Is that your sister on the last page of that exhibit?

A. My sister on the last page, yes. It's kind of amazing, because she's a horrible shot. So it's like she

-- not only was it kind of decent, but she actually killed something.

Q. Okay. All right. So you started a family. What happened next in terms of your job history?

A. Well, it was about '05, and I got a job as a game warden for the Crow Tribe. The director asked me -- he just walked up to me and said, "Would you like to be a game warden?"

I was working at the Casino I think at the time. And I was like, "Yeah. When do I start?"

He said, "You can start tonight, but you have to stay up there for two weeks."

I was like, "Let's go."

[398] Q. Let me stop you. Stay up where?

A. Stay up in the mountain.

Q. Okay. The Bighorn Mountains?

A. Usually it's called second checkpoint, up in the Bighorns. That's kind of where families stay, game warden. There's like a cabin there. It's just kind of our rendezvous point.

Q. Okay.

A. And from there, couple months later, I went to the police academy. I have to be certified within a year. So I actually went to South Dakota and I got certified there. Came back, got certified in Montana. And then I transferred over to police department, and I was a police officer for a while. Then I turned to drug investigator. And from drug investigator, I went -- actually got deputized by the FBI and was on the Safe Trails Drug Task Force for little over a year. After that, I was with the DEA for a while. Transferred to

their -- their drug task force. And I -- then I was in charge of Major Crimes Act federally, as a CI. So like 18 U.S.C., 21 U.S.C., all that stuff. And --

Q. What -- let me stop you for a minute. What's the Major Crimes Act?

A. Major Crimes Act is -- it's basically crimes that we can pursue federally on the reservation.

[399] Q. So there are -- you mean -- when you mean pursue, you mean prosecute?

A. Prosecute. Work cases. And as a CI, we really didn't work anything through tribal court. Everything we did was through federal court, so I had --

Q. What's a CI?

A. A criminal investigator.

Q. Okay. And the Major Crimes Act, there's -- is there also part of that act that gives exclusive jurisdiction over certain crimes to the United States?

A. I believe so.

Q. And so you've had experience in federal court, I think you were saying.

A. Federal, State and tribal court. Right. I had three jurisdictions and capabilities to prosecute in those jurisdictions at the same time.

Q. Okay. So tell us the -- the moving forward. What did you do next in your job history?

A. Well, I got a lot of my training from the FBI. Did FBI crime scene, FBI meth lab, FBI interview and interrogation, the Reid techniques, just kind of different ways of doing stuff, FBI SWAT tactics, you know, dynamic entry, stuff like that. Kind of a lot of stuff, just kind of trained me up and just kind of set

me free. And I just, you know, did -- did what I could where I could. [400] But having three little girls and doing that stuff is kind of hard, you know, when you're -- you're on call 24/7 as a CI, someone dies, someone gets stabbed, you've got to jump up and go to the scene, so -- I think they were all in Pampers at the time, and I just decided that I would go somewhere else. It was just taking on too much -- too much bad from the res, I mean, and trying to take care of family at the same time. Like the old guys would be talking about they didn't see their kids grow up and stuff, so I didn't want that.

So I got out of that for a bit and got back in as a game warden in 2012. I worked up to lieutenant. From lieutenant I went to captain. And as captain, I started kind of changing the mindset to conservation on the reservation. Like we're doing cutthroat trout. We had one of the only species of 100 percent genetic native cutthroat trout. Yellowstone cutthroat trout. And we -- we go down, we take those out. They go to the hatchery. Some come back and other people get them that need them.

And we just did the greater sage grouse project last year. I don't know if people know --

Q. What's that project?

A. The greater sage grouse. They were going to be enlisted, but they weren't quite sure, into endangered species. So the way that affected us was with coal and [401] our mineral rights and stuff. So we had to get a survey done. We had to do a protection plan. And then we had to pass it into law in the legislature. And we did that last year. It was kind of a lot of work.

And at the same time, because they're kind of in the same area, and it was kind of, you know, not too -- whatever that saying is, but we had black-footed ferret program start up. We started mapping prairie dog towns, working with U.S. Fish & Wildlife.

Q. Let me stop you there. The black-footed ferret. Is that an endangered species? Actually, I'm going to ask you this first. So in your work, you worked with the Endangered Species Act?

A. Endangered Species Act, yes.

Q. Okay. So what about the black-footed ferret? Is that an endangered species?

A. It's an endangered species as far as I know. There was eight left in the world, and U.S. Fish & Wildlife Services actually collected them. And I think they're based in Colorado. And they started breeding them in captivity. And we busted our butts. Even the girls helped. And we actually qualified to get 30 ferrets last year in October. So me and the girls and a couple of the volunteers and U.S. Fish & Wildlife, World Wildlife Fund, APHIS, USDA, we all went out and released them back into [402] the wild where they belong. And they're also sacred -- the black-footed ferret is sacred to the Crow. And it's one of the songs sung in the Tobacco Society, for women. So it was kind of good thing to do for one, and also culturally significant for us to bring it back.

And, unfortunately, there's only probably like five left alive, most likely. But every year we're going to get 20 more, and just keep releasing them until they kind of get a foothold and take off again.

Now we're starting like swift fox -- swift fox stuff and -- I can't remember. Something else too.

Q. Well, let me take you back to one of the things you said about why you went back to the Fish & Game Department from more intensive law enforcement.

So you talked about your -- your girls. Are you a single father?

A. I'm a single father. And it's kind of tough finding babysitters and stuff, but working at Fish & Game, they can come out with me and -- my office is outside. My office is the world, and I can show them around, talk about stuff, long talks and just, you know, I'm the only one that really takes care of them. And when they're beside me, I don't really have to worry about where they're at, or babysitters or -- I can just get my job done. And they actually help out a lot too, so...

[403] Q. So they're pretty important to you?

A. Yeah.

Q. So you -- do you base a lot of the things you do -- you think about your girls first?

A. Yeah. Pretty much have to. And kind of (unintelligible), so...

Q. Okay. All right. So let's continue with what you're saying about your job duties.

A. We do -- I mean, I can't think of the other -- my mind's kind of mush right now. But like we also do special forces training. In Black Canyon we do -- Seal Team 6 was here this past summer, and we do like parachuting. They do steep incline/decline shooting, long-range, stuff like that. And we just kind of

facilitate stuff like that. And kind of secretly, don't tell anybody, but we work with private military contractors from the East and they come and it's -- it's pretty neat. So I kind of knew they were heading out somewhere before everyone else did, so...

Q. Okay.

A. I can't really say too much about it.

Q. Sure. Don't breach your confidence.

So I think you -- you mentioned a little with the -- the -- I'm sorry. The grouse. What kind of grouse is it?

[404] A. It's called the greater sage grouse.

Q. Okay.

A. And it's the -- they're like that big. They go in these places called leks, and it's the breeding ground. And it's like a circle and they puff up and, you know, they try to punk each other out. They kind of dance and stuff. It's also part of our culture, because some of our dancers imitate birds. Some of them imitate the -- at the powwows, they imitate maybe the sage grouse, maybe the sharptail. Sharptail likes to shuffle its feet a little bit.

Q. Uh-huh.

A. And some guys like to do that. They call it chicken dancing. But like every animal out there is actually important to us and may have a meaning and they're kind of all placed -- in our way, we're no better than the animals. God put them here equally as us, so -- and we have to take care of each other. And, I mean, we come from a culture where living outside and outdoors and with the animals and living in harmony

with them is actually a necessity, number one. And it goes into religion and it just ties in a lot of different ways.

Q. So you mentioned something about a Tobacco Society. What's that?

A. I -- I haven't really -- I don't think I would [405] have the qualifications to talk about it. Someone like my mother would. She's a member. And I -- I can't really delve into it.

Q. So it's something that's a female rather than a male thing?

A. No. It's -- it's male and female. It's just what I was referring to earlier was one of the songs sung about a female, about -- a sacred song. It has to do with black-footed ferret.

Q. Okay. But do you know enough to talk about the type of tobacco that is meant? Is it tobacco like meant in a cigarette or something different?

A. No, it's -- well, we were put -- the reason why we were here is the creator put us here by giving one of our ancestor chiefs some sacred tobacco seeds. And our -- our tribe actually wandered for years and years trying to find the place where it would take root, and it took root in the Bighorn Mountains. That's the reason why we're here today.

And they also say, you know, well, we'll always have the Bighorn Mountains. And it's -- it ties into history.

Q. But do you know the story of Big Metal?

A. Yeah. I'm familiar with the story. I don't want to mess it up and ruin a detail or two. You know, [406] it's --

Q. So it's essentially the -- the story of a young Crow boy after the Crow have come to the Bighorn Mountains because of the sacred tobacco, who gets lost in the wilderness and is rescued by some bighorn sheep?

A. Yeah.

Q. And one of them is named Big Metal because he's got metal hanging off of his --

A. Yeah. Seven sheep. One was Big Metal.

Q. Okay. And as I understand this story, part of what happened was this -- this young boy who is sort of the -- one of the members of your tribe, was rescued by the bighorn sheep who told him a couple of prophecies that are important to your tribe. Is that right?

A. Something like that.

MR. LAROSA: Your Honor, I would object to the leading nature of the questioning. And -- and to it's -- it's not relevant to what we're here for.

THE COURT: It is sustained. If you have questions, would you please ask questions of Mr. Herrera --

MS. GRAY: I will, Your Honor.

THE COURT: -- instead of leading and telling a story.

MS. GRAY: Okay.

Q. (BY MS. GRAY) So does part of the story have to [407] do with the name of the mountains and the river?

A. I believe so. As long as -- as long as it's called the Bighorn Mountains and the Bighorn River, there will always be Crows around.

Q. Okay. And when you say "Crows around," you mean members of your tribe?

A. (Unintelligible), yeah.

Q. So can you tell us -- so is Crow -- and it's an English word. We all know it. It's a big black bird. How did that come to be the name of your tribe?

A. It started as children of a large-beaked bird, and it was just kind of lost in translation. They thought it was -- they picked a big bird with a big beak and it was a crow and they called us Crow, pretty much.

Q. Okay. So it was not natives who gave you that name?

A. No. We -- it was (unintelligible), you know, our side, so...

But, yeah, Crows is a European term.

Q. Okay.

A. That's just -- we got to use it to speak English, so...

Q. And did you grow up speaking Crow?

A. My first language was Crow until first grade. I had to learn English to do good in school.

[408] Q. Okay. So part of what you were telling us about -- with the -- the grouse was that you had to --

you had some involvement with the survey; is that right?

MR. LAROSA: Again, I object to the leading nature of this questioning, And to its relevance to this proceeding.

THE COURT: Sustained.

MS. GRAY: On which ground, Your Honor?

THE COURT: Both.

MS. GRAY: Okay.

Q. (BY MS. GRAY) Okay. So, Mr. Herrera, you heard Mr. Shorma's testimony, correct?

A. Yeah, I did.

Q. Okay. So one of the things he talked about was how important it is for a -- a game warden to know his district.

A. Yeah. I heard him say that, yeah.

Q. You remember that?

A. Yeah.

Q. Yeah. And are you -- have you looked at the -- the map that was put in regarding -- when Mr. Shorma testified about what his district was?

A. I seen it, but I didn't -- I didn't identify the district --

Q. Okay.

[409] A. -- personally, so...

Q. Let's take a look at that exhibit.

I'm handing you what has been marked as State's Exhibit 5. Have you seen that?

A. Yes, I did.

Q. Do you remember, from listening to Mr. Shorma, what district he was talking about?

A. I believe he said 38.

Q. Hunt District 38? Can you tell how big that is, acreagewise?

A. I could guess, you know, it wouldn't be --

Q. As a general idea. Ballpark figure.

A. Oh, I would say it's probably 280,000. I don't know. Maybe 50,000. I don't know.

Q. 50,000 acres?

A. 50 to 200,000, just the scale is --

Q. All right. Something in that -- in that general vicinity?

A. Yeah.

Q. How many acres are in your jurisdiction?

A. 2.2 million acres.

Q. Okay. So one of the things that Mr. Shorma suggested was a game warden has to really know with certainty his district.

A. Yes.

[410] Q. Is it possible for you to know with certainty 2.2 million acres?

A. I'm trying, but -- and every year you learn new stuff, and I still probably haven't hit every single place on the reservation. And I've been, you know, living on the res a lot. And we have three mountain ranges. We got a couple of valleys, and we got, you know, foothills. I mean, we got everything from mountains down to plains down to pretty much everything. And it's thick in foliage. Sometimes -- I mean, summertimes, you

can't even get to some spots, unless you want to get ticks and bit up by mosquitos or scratch up your truck, things like that.

Q. So when you listened to the testimony about where the State alleges that the shooting took place -- and let me ask you this. You don't disagree that you shot the elk in question, do you?

A. No. I got it and ate it.

Q. You got it, you shot it and you ate it, right. Okay.

So this dispute's over something else and so -- and then that area where you went hunting, had you hunted there before?

A. I believe that was my first time hunting in that area. Dry Ridge, Horse Ridge area.

Q. Okay.

[411] A. Big -- yeah, they call it Eskimo Creek. But we kind of go by -- we go by different things, you know. We're two different cultures. They have their way of explaining things or judging things. We have our own way of doing things. And we have different names and -- and I don't know if we even call areas in our mountains by the road names or stuff like that. We go by landmarks, by sacred sites, you know, things that have been passed down. So it's just -- it's two different worlds we're in and we've got to try to do good at both of them, so...

Q. Okay. So there was some testimony when Mr. Shorma came back on the stand here about a text message. Let me ask you, how -- how did the hunt get arranged?

A. Well, we were all Crows, and it's not like we're guiding each other, or, you know, showing each other. We just, you know, we sit -- I think -- I thought we planned that one face to face, like who wants to go? You guys want to go? All right. Let's go out. I wasn't even driving a vehicle. I was a passenger in a vehicle. But, I mean, the way we hunt, collective thinking, collective opinions, and we kind of hash things out, and just kind of -- no one leads it. I mean, people -- I mean, there's common tactics that everyone will use and you just fall in, I guess. It's just natural. It's not planned.

[412] Q. So was the hunt planned with the intent to go into Wyoming?

A. No. And I don't even think it was my idea. I can't even remember. It was someone in the other truck. Because there was two vehicles, I believe. And when we started -- yeah, there's no plan of going to Wyoming.

Q. Okay. So let's go back, then, to this -- the day that Mr. Shorma -- well, actually, let's --

MS. GRAY: May I approach, Your Honor?

THE COURT: Yes.

(Inaudible sidebar conference.)

Q. (BY MS. GRAY) Mr. Herrera, do you need some water up there?

A. Yeah, I could use some water.

MS. GRAY: May I, Your Honor?

THE COURT: Yes.

A. That's out, though. I drank that up.

Q. (BY MS. GRAY) is this the one that dumps on -- oh, it's out?

A. There's nothing left.

Q. (Unintelligible.)

MS. GRAY: Thank you.

Q. (BY MS. GRAY) So, Mr. Herrera, I put in front of you the exhibits -- State's Exhibits 8, 11 and 10. Let's talk about 8 and -- so (unintelligible) Shorma [413] talked regarding no tell 'em ridge. You remember that testimony?

A. Yes. Yes, I do.

Q. And that Mr. Singer talked about don't tell ridge, do you remember that?

A. Yeah, I remember.

Q. Okay. So have you ever heard those terms before?

A. I -- yeah. In various ways. Like he said, you know, no tell 'em creek, no tell 'em ridge. Variations of don't tell them, stuff like that. It's just a common -- common thing for hunters. Actually, there's people that will steal your spot and ruin it, so people don't want to share where they're getting their game. And it's kind of just, I don't know, common -- common not to tell, really, I guess.

Q. So well before this dispute, you yourself had used those terms or similar terms?

A. Or had them used on me, yes.

Q. Okay. So -- so back to the day -- actually, let's -- let's go through the rest of the day of the hunt.

So we -- you heard Mr. Shorma give his testimony of what you told -- he says you told him when he interviewed you. Do you remember that?

A. Yeah.

[414] Q. Okay. So what I'd like you to do now is -- is tell the jury what happened on the day of the hunt.

A. On the day of the hunt, we -- when we hunt elk, for me, the best luck is at very first light. The very first light is kind of crucial to successful hunts. So we've got to be out there just before first light, so we planned maybe leaving 4:00, 4:30, rounding up -- I think it was me, Colt -- baby Colton, Colt's truck, Colt picked me up. And early the day before, I think we planned on meeting on Red Grade somewhere, and just start glassing. Start glassing up onto the face and --

Q. Start what?

A. Glassing.

Q. What's that?

A. Get the binos out, scopes out, just start -- start searching and looking.

Q. Okay.

A. Find -- find your game.

Q. So where you were looking at --

A. Yeah.

Q. -- was that within the Crow Reservation?

A. Yes.

Q. Okay. Continue.

A. Started glassing, and we spotted maybe a couple hundred cows feeding, some bedded. They weren't spooked [415] or anything. And up on Dry

Ridge, and there's -- I think it was Dry Ridge or Horse Ridge, but there was a bull there. And the snow is pretty deep. I think one truck had four chains in the back ready to go. One truck had two. I'm not sure. Someone didn't have enough chains. But we made it to the bull -- almost to the bull. And then the plan was to get out and hike to the ridge, into the trees, and then just kind of get up on them and --

Q. So is Dry Ridge within the exterior boundaries of the Crow Reservation?

A. Yes, it is.

Q. All right. So let's talk about snow for a minute. So this happened in the -- well, the -- the 2014 portion of the winter of 2013-2014; is that right?

A. Yeah.

Q. Okay. Do you remember that that year?

A. That might have been our last really good winter. I'm not sure. I think we did a lot of snowmobiling that year too. I'm not sure. But there was like two to three feet of snow in some places, and just taking a step was kind of tough. Especially you step uphill just --

Q. Kind of sink into the snow?

A. Yeah, sinking in the snow. It saps your energy. I mean, it -- it was -- but, you know, we pretty much had [416] to. It was -- it was a meal seal -- meal seal kind of day.

Q. What do you mean by that?

A. That was a time when the tribe was in recession bad. And they cut our hours. They cut our pay. I was cut down to like 32 hours a week. They cut

me down to like $10 an hour. That's like less than 400 bucks every two weeks. And growing kids, they eat -- they eat more than me now, but I had to give -- the plan was to get an elk to -- to eat it. Live off it. And --

Q. Do you eat -- do you feed a lot of elk to the girls?

A. Yes, I do. We -- maybe 30, 45 days out of -- every winter we're eating elk in various ways. We're eating elk summer sausage, along with deer. And -- it's just our -- our diet. It's better on our stomachs. We're not used to the sugars and fructose corn syrups and all that crazy stuff. And the European diet that they have now, and just there's -- I mean, it's obvious with high diabetes rate with the Native Americans and -- it's just -- I think it's healthier for my girls. I mean, you can see growth spurts, I mean, when they're eating elk meat and buffalo and whitetail. And it's just -- to me, it's better on our stomachs and our digestive systems.

Q. So your girls think you're a pretty good cook?

[417] A. I hope so. Yeah, I think they do. I'm the best cook ever, probably.

Q. Okay. So how many elk do you take a year?

A. Average, two, three, maybe. And even if that. Sometimes there's a high poverty rate on the reservation. We have a lot of family members. We have a lot of relations. When we come back from a hunt, a lot of people are --

MR. LAROSA: Your Honor, I'm going to object to these. He's going into a narrative beyond the question.

THE COURT: Sustained. You'll need to ask your -- ask and answer questions.

MS. GRAY: (Unintelligible.)

Q. (BY MS. GRAY) Okay. And that's -- okay. And that's pretty much every year that's pretty common for you?

A. Average, yeah.

Q. Okay. So have you ever been -- let's see how to phrase this. Has anybody ever suggested you took those elk anywhere other than the Crow Reservation?

A. No. They wouldn't be able to.

MR. LAROSA: Object to that question. It's irrelevant and completely misleading of the issues.

THE COURT: Sustained.

[418] Q. (BY MS. GRAY) So have you hunted for elk somewhere other than on the Crow Reservation?

A. Me and my brother go to Ennis every year. We haven't the past year or two. But for about 10 years we used to hang out with his buddy, stay down in Park, Idaho snowmobiling and going to Ennis and doing some hunting for some elk.

Q. So far on the northern --

A. West --

Q. West -- to the west.

A. Border of Idaho.

Q. Okay. With Montana.

And when you go do that hunt, do you buy a -- a tag?

A. Yeah, we buy a tag. It's a little awkward. You buy the tag. And then the first time I bought a tag, I thought of myself as a seasoned hunter, and I bought the tag and they were looking at me like I didn't know how to hunt. And then has to wear like orange and --

it was just weird. The way they hunted over there, I didn't like it. They like surrounded the elk in like this square fence and just --

MR. LAROSA: Your Honor, I'm going to object again. This is more narrative answers after the question's been asked.

[419] THE COURT: All right. Let's just move on.

Q. (BY MS. GRAY) So there you believed you were outside of the -- the area where you could hunt legally as a -- as a member of the tribe, and so you bought a tag?

A. Yeah. We were outside the reservation, and our ancestral hunting grounds. So in Idaho, tag's the way to go.

Q. Okay. All right. So back to the day in question. So you glassed the -- let me ask you another follow-up question then.

So when you go -- when you've gone in the past to hunt and did get meat for the girls, have you ever had a problem finding an elk inside the exterior boundaries of the Crow Reservation?

A. No, I have not.

MR. LAROSA: Again, I'm going to object to the relevance of the line of inquiry. It is not directed in any way to be (unintelligible).

THE COURT: Your response --

MS. GRAY: Your Honor, I think it goes to the ability to find elk on the reservation, and some of the implications that maybe there was an intent to go to Wyoming.

THE COURT: I'll overrule the objection.

Q. (BY MS. GRAY) So you had no problem finding elk [420] to get meat for the girls within the boundaries of the Crow Reservation?

A. No problem at all.

Q. Okay. So this elk herd that we've all been -- been hearing about, do elk know what boundaries are?

A. No.

Q. And -- so then do they go back and forth between the Bighorn National Forest and the Crow Reservation?

A. Yeah. Elk are a migrating animal.

Q. Okay. And the elk that was shot -- actually, the three elk that the testimony's been for were shot on the day in question, where did they start out in the day?

A. I think they were bedded there the whole time. We didn't see them. The cow -- because that time the cows kind of separate from the bulls, and the bulls that are with the cows would probably be like spikes and rags and small stuff.

Q. Okay.

A. And they are -- they are just too fast. And we found ourselves right beside them out of nowhere. We were so focused on the herd in front of us we didn't even see it, and they were sleeping.

Q. So that was on the Crow Reservation?

A. I believe it was.

Q. Okay. Okay. So you see the elk. You start [421] going after them. Did they run?

A. No. They didn't -- I think they were napping, sleeping. They -- they didn't run. They just dropped -- kind of dropped them where they laid, like colts. They ran a little bit, but it was pretty -- it was -- it was a good hunt. It was a good day.

Q. Okay. So when you pulled the trigger to take your elk, where did you believe you were?

MR. LAROSA: Your Honor, I'm going to object to the -- I think that his belief is irrelevant.

THE COURT: That's sustained.

MS. GRAY: Your Honor, I think our response to that is -- may we approach?

THE COURT: Yes.

(Inaudible sidebar conference.)

MS. GRAY: May I have a moment, Your Honor?

THE COURT: Yes.

Q. (BY MS. GRAY) So, Mr. Herrera, you talked about the snow cover. And can you tell me how -- how deep the snow was in the area where you were pursuing the elk?

A. It was average from height -- high on my calf to some places my waist.

Q. Okay. So if there were any border markers in the area where you were doing the hunt, would they been visible?

[422] A. Not in that kind of snow.

Q. And did you see any border markers that said State of Wyoming or Bighorn National Forest or anything of that nature?

A. During the hunt, no.

Q. Okay. And there was some testimony from Mr. Shorma about the Marble Quarry Road and -- here let me -- let me look through the exhibits.

Mr. Herrera, I'm handing you what has been marked as State's Exhibit 16. Do you remember Mr. Shorma testified about that exhibit?

A. Yeah. I remember him talking about this.

Q. So looking at that exhibit, was that taken in the same conditions that existed at the time you were engaged in the hunt in question?

A. No. Not even close. It's dry.

Q. So what's the difference?

A. It's dry here. You can see all the rocks. You can see, you know, the landscape, everything. The day we hunted, you know, it's covered in snow, and snow hides a lot of stuff. Rocks, potholes, little drops -- drop-offs and stuff like that.

Q. Okay. And there was some testimony regarding you stopped and you parked the truck because there was too much snow to move on. Did you ever get your trucks [423] anywhere down near Marble Quarry Road?

A. No. We didn't even -- we weren't on Marble Quarry Road. We were up -- I guess the turnoff would be here. The Marble Quarry probably turned off up here, further up on top of it, that's adjacent to the ridge there.

Q. So did you see anything like -- I'm sorry. What's the exhibit number?

A. 16.

Q. Anything of the nature of that exhibit?

A. No.

Q. So while you were on the hunt, as you went in -- as you're -- you're focusing in on the elk that you're going to shoot, did you see anything that was posted or indicated that you were entering the state of Wyoming?

A. No.

Q. Mr. Herrera, when you shot the elk in question, were you in Wyoming?

A. No.

Q. Okay. So now I want to take you back to an issue of your job duties. So did you have any -- were part of your job duties to look into this --

MS. GRAY: Your Honor, may we approach on this?

THE COURT: Yes.

[424] (Inaudible sidebar conference.)

Q. (BY MS. GRAY) Mr. Herrera, (unintelligible). State's Exhibit 8, can you read the top of -- the text on the top of there?

A. The title?

Q. The whole -- the text on top of the photo.

A. Good year on the Crow Reservation. Good year on the Crow Reservation. Photo provided by Clayvin Herrera. Clayvin Herrera scored quite well. Top two photos. As did Ronnie Fisher, Clayvin's nephew, Colton, Jr., and sister Adrienne, bottom photo. It was a good year on the Crow Reservation in Montana.

Q. Okay. And so you posted that on -- I think the website's called Monster Muleys?

A. Yeah. I post every year.

Q. What is Monster Muleys?

A. monstermuleys.com?

Q. Well, what's the website?

A. Yeah, it's -- it's affiliated Muley Crazy Magazine. And I've got some buddies that are Muley Crazies and Monster Muleys. And when we get something good, we usually send it to each other and I throw it on the -- I throw it on the Monster Muleys.

Q. So Mr. Shorma said something in his testimony about when he first looked at it, he thought you were [425] trophy hunting. Are you a trophy hunter?

A. I am a hunter. And by nature and if I had to categorize myself, I would mostly get meat. Can I get a trophy? Most likely. I think I'm pretty good at what I do. And I think I've been hunting -- like my first memory as a kid is hunting, fishing. That's just the way I grew up. The way I was raised.

Q. So there was an implication that the elk here that you shot was a trophy elk. Is that a trophy elk?

A. No. It's -- I would categorize it as a small six. I mean, that's like -- it's -- like trophy standards, no, it's not a trophy.

Q. So --

A. It's probably not even a 300.

Q. For those of us who are not elk hunters, what do you mean by a small six?

A. It's a 6-by-6. The -- the last -- the last tine is like small. That one's small. I mean, that -- the eye guard's, second, third, they're all mediocre, I guess and kind of -- there's a little bit of mass on the -- on

the main beam, but that's -- I mean, he probably would have been pretty good the next year or better the year after.

Q. So the six means the amount of --

A. 6-by-6.

Q. -- points on the antlers?

[426] A. Yeah. He's got six on each side.

Q. Is there some kind of scale among hunters of what is a trophy worth bragging about for -- A. Nontribal hunters usually go by Boone and Crockett. And that's a -- I don't even know what to do. But if like you get close to a 400, that's a trophy.

Q. 400?

A. Like 400, the mat -- like you add up the points and the main beam and maybe the widths, stuff like that. There's a calculation how you do it. And -- and that sends -- close to a 400 is a trophy. And if we were using that scale, this would be -- I don't even know if it was 300.

Q. Okay. So a mature elk, as Mr. Shorma described it, but not any kind of a trophy grade elk?

A. No. No.

Q. Okay. So -- and Mr. Shorma gave a -- a bit of testimony about tenderloins. What are tenderloins?

A. Tenderloins. Sometimes people get them mixed up with the -- the -- it's usually the backstrap and the tenderloins are inside the muscle. It's along the spine on the inside. You can either get into it by taking the -- the insides out here or -- or you can take the backstrap out and then get it through the outside of

the hip. I mean, there's a couple -- two ways to get it, I [427] guess.

Q. Is it good meat? Good eating meat?

A. It's probably the best meat. It's --

Q. Okay. So did you take the tenderloins from the elk you shot?

A. I take tenderloins from every elk I shoot. It's a travesty not to.

Q. So did you -- did you assist -- or did you see how the others butchered their elk?

A. Not really. I -- we all started -- I mean, we had -- we knew we had a -- after the fun was over, I mean, it's like the job -- time to get to work. I think I ended -- I think I skinned this one by myself. And I kind of skin faster than most people. And everyone was working on their own. And I even had enough time to show my nephew how to take the hide off the -- the head, take the eyeballs out, the tongue out, and just the -- lower jaw just to minimize the weight for the pack. Just kind of showing them how to throw it on and how to put your stuff on.

Q. So Mr. Shorma gave some testimony that he was not certain you took the tenderloins because he didn't see any knife marks where he would expect to see knife marks for someone who's removing the tenderloin.

A. I removed the tenderloin without touching bone. [428] You pull it and the sinew and the connections -- I mean, it's really tender. And if you just stuff your finger, you can even pull it apart. And it's better to cut that way, because you also get more meat that way, instead of just hacking at it with a knife.

Q. So you didn't leave the tenderloins behind?

A. No.

Q. Okay. So you talk about how important your girls are in your life. Would you ever take a chance at doing something that could possibly take you away from your girls?

A. No.

MR. LAROSA: I would object to the question, Your Honor.

THE COURT: It's sustained.

Q. (BY MS. GRAY) Are they in your mind when you're making decisions of how you act and what you do?

MR. LAROSA: Same objection.

A. A hundred percent of the time.

Q. (BY MS. GRAY) She hasn't ruled yet. You have to wait for the Court to --

THE COURT: I'll overrule that one. It's a general question.

Q. (BY MS. GRAY) You can answer.

A. A hundred percent of the time. I'm thinking [429] about them right now.

Q. Okay.

MS. GRAY: May I have a moment, Your Honor?

THE COURT: Yes.

Q. (BY MS. GRAY) All right. Exhibit 8. Can you tell me the title of that -- the text -- the name of the --

A. I guess -- the picture?

Q. Right.

A. The title of the picture is Good Year on the Crow Reservation.

Q. And you wrote that title, correct?

A. I wrote that.

MS. GRAY: We have no further questions, Your Honor.

THE COURT: Thank you.

Mr. LaRosa, you may cross-examine.

MR. LAROSA: Sorry, Your Honor. I'm having trouble finding an exhibit.

THE COURT: That's okay.

MR. LAROSA: 23, and it's not -- (unintelligible).

MS. GRAY: Mr. LaRosa, is this the one?

MR. LAROSA: That would be the one.

MS. GRAY: Sorry about that.

[430] CROSS-EXAMINATION

Q. (BY MR. LAROSA) Good afternoon.

A. Good afternoon.

Q. I'm going to give you State's Exhibit 23. Mr. Herrera, you testified that when you pulled the trigger, you were on the Crow Reservation. Can you identify (unintelligible)?

MS. GRAY: I'm sorry, Your Honor. I'm having difficulty hearing Mr. LaRosa's question.

Q. (BY MR. LAROSA) You said when you pulled the trigger you were on the Crow Reservation.

A. Yes.

Q. Point to where that was.

A. Where I pulled the trigger? I pulled the trigger right here. And I think the Crow Reservation is there as well.

Q. Please mark it with an X?

A. Okay. I think we were right there. I'm not sure, but close enough.

Q. And so they can see where you marked it -- this is just a bigger version -- point at it with your finger where you were when you pulled the trigger.

A. I believe I was in -- I remember these trees, maybe. So maybe right here, because we came out of the trees straight across, so...

[431] Q. Thank you.

Okay. You testified that your jurisdiction is 2.2 million miles, correct?

A. Acres.

Q. Acres. Sorry.

A. I wish.

Q. The --

A. It used to be.

Q. And is that essentially the entire reservation?

A. No. There's other tracts that we own that are not connected. But essentially, I guess, for whatever -- whatever, yeah, it's 2.2 million acres.

Q. Okay.

A. That's how we commonly describe the reservation.

Q. And you stated that -- and you -- in January of 2014, you had been warden for -- since 2012. That's when you said you went back.

A. About the end of 2012. About Novemberish. And I got laid off from the administration in December, came back on about January, actually.

Q. The -- and in January -- and you also testified, did you not, that basically you'd never been to this area where this transaction happened before until that day -- never hunted in that area before.

A. Never hunted for, yeah, elk in that area.

[432] Q. You'd gone to that area before, had you not?

A. Not really. I don't really visit the face. When I go to the mountains, I go into -- me and my daughters go into Black Canyon. We go into, you know, Black's Cabin. We go Big Bull, Little Bull, (unintelligible), go to the Wolves. I mean, to the face in general. Not really -- not a lot.

Q. The -- all right. And when you said -- you sent that email -- you -- you sent an email on January 31st to Dustin Shorma, didn't you?

A. Yes, I did.

Q. All right. And that email expressed a particular interest in an area called the border, right?

A. Yes.

Q. All right. And you, in that email, were offering to focus a particular interest of yours and hers [sic] on enforcing your mutual laws at the border?

A. Her? Who's her?

Q. I'm sorry?

A. You said "her."

Q. Her?

A. Hers?

THE COURT: You said hers. Yours and hers.

Q. (BY MR. LAROSA) Your particular interest in that email was enforcement at the border, was it not?

[433] A. Yes. I believe lieutenant at the time. I'm not sure.

Q. And Warden offered to meet with you on that occasion, didn't he?

A. Eventually, yeah. I think I ended up emailing a couple of guys and then getting to Shorma and -- yeah, we actually needed help.

Q. All right. And you met him, actually, relatively close to this area, didn't you?

A. To which area?

Q. When you met him on January 30th, you met him relatively close to the Marble Quarry Road, did you not?

A. Hmm. I think we were closer to other roads -- closer to the bridge, closer to the Little Horn. I mean, it wasn't far, but, yeah, it was in the area.

Q. And you didn't have any trouble getting there, because you know the area, correct?

A. I know most areas, yes. Especially, you know, main arteries. Like Little Horn Road. You got Red Grade and it goes over to Rotten Grass. And you've got the road that goes up into first checkpoint. It's kind of a main artery. Even people that don't know the mountain know it. And then you go into Pass Creek too, the other way, that you can go around back to the road.

Q. You testified that there was a lot of snow on [434] the day you hunted.

A. Right.

Q. And you took pictures after you killed those elk, correct?

A. Yeah. Right here.

Q. And the exhibits that you've been shown are some of those pictures?

A. Yeah. Pictures in the (unintelligible), yeah.

Q. That was one of the pictures, wasn't it?

A. Yep.

Q. And that's your -- I believe your nephew, right?

A. That is my nephew, Baby Colton, is what he's referred to as.

Q. And how deep is the snow? It's not very deep at all, is it?

A. Yep. But snow varies too. If you're a hunter, you got drifts and --

Q. In that location, it isn't, is it?

A. No, not in that location.

Q. And that location isn't far from the Marble Quarry Road, is it?

A. I'm not -- I think the road's this way. But it shouldn't be too far from the road.

Q. This isn't very far from where you pulled the trigger, is it?

[435] A. I'd say we were about 250 yards, maybe 300. A pretty decent length for shooting. I mean,

typically hundred yards would be the best -- would be not far.

Q. So you were in the area of the Marble Quarry Road when you pulled the trigger, weren't you?

A. Hindsight, yeah. There's maps that say Marble Quarry pointed to the area where we were at, and it's pretty close to it.

Q. You would agree that you're supposed to know where you get to do your job, right?

A. What do you mean?

Q. Where your -- where the -- let me ask you this. The -- you're a game warden on the Crow Tribe, right?

A. Yes.

Q. Okay.

A. Captain.

Q. And you enforce the laws where you have authority to act, correct?

A. I enforce the -- we actually -- yeah, the Title 12 Fish & Game code.

Q. And where you work it's the hunter's responsibility to know where he is, isn't it?

A. It's usually how it is, yeah.

Q. And you tell them that in the information you publish, don't you?

[436]

A. I tell them -- the booklet says, yeah.

Q. And, particularly, you tell them they need to know where the exterior boundaries of the Crow Reservation are, don't you?

A. Yes.

Q. On the day you met Dustin Shorma -- and you met him close to the border, didn't you?

A. Our first meeting?

Q. Yeah. January 30th.

A. We met -- yeah, we --

Q. It was January 30th, was it not? Was it on January 30th?

A. I believe so. I don't mark down every date I meet someone, but I'm pretty sure it's pretty accurate.

Q. And you made him close -- you met him close to the border, did you not?

A. Yeah, on the reservation.

Q. And across from the border is Hunt Area 38, correct?

A. I don't know your areas.

Q. You were offering to help him police his area, were you not?

A. Not -- no, I wasn't. I was actually looking for help, because we have the same problem on our side. And I have no authority on his side, but what I wanted to do is [437] build a partnership and try to get some of the guys on my side, and maybe, you know, match some of these carcasses to some heads hanging on some sheds of some, you know, well-known poachers. People that waste. I mean, the way he talked and the way he felt, I mean, I felt the same exact way as he did. And it hits home to me, and it's -- it's the way I was raised by my mom and grandma and dad and family, so...

Q. And he expressed some interest in doing likewise, right? He was interested --

A. Yeah.

Q. -- in -- in prosecuting violations on his side and catching people, including members of the reservation, who were doing illegal activities in Wyoming, correct?

A. I wasn't so worried about Wyoming side. I was worried about our side.

Q. I'm asking what he asked you. He expressed an interest in that, did he not?

A. Yes, he did express interest.

Q. And he actually even named a name, didn't he?

A. I think we talked about several names. I think he even -- yeah, I remember a couple -- couple names that he had stated. But, yeah.

Q. He mentioned DL Singer in particular, did he not?

[438] A. Yes.

Q. All right. And, I mean, you didn't tell him like he was a good buddy of yours at the time, did you?

A. He's not a good buddy of mine.

Q. Okay.

A. And on the reservation, you have to deal with close relations, especially when I was an officer. And you have to distinguish that from personal and business. And as a cop, I even arrested my own wife once. I had to. So -- but it's tougher on the res than off res. You've got to understand it's two different societies, and in order to do that job, I mean, you got to deal with people you know.

Q. I believe you've answered my question, sir.

A. All right.

Q. You acknowledged that you did post those photos at the Monster Muleys place, correct?

A. Yes.

Q. All right. And you don't really consider the animal you killed to be a trophy, right? That's what you testified?

A. No, it's -- I mean, it's -- it's decent. He's a good one, but he's not -- he's not the trophy.

Q. Right. But you did post him in a forum that was a contest for big bucks, big bulls and other big game?

[439] A. Oh, there's hundreds on there, and there's so many nontrophies on there. It's -- I posted it on there. It's -- it's a hunters forum. You check out people's kills. People -- their first time kills and people with their kids on there. There's all kinds. It's not just trophies.

Q. It was a forum that invited people to post what they thought they considered a large animal -- a large trophy animal, was it not?

A. I don't even think the winner would be a trophy.

Q. I didn't ask you that, though. I asked you the forum invited people --

MS. GRAY: Your Honor, I --

Q. (BY MR. LAROSA) -- to post what they considered to be a trophy animal.

MS. GRAY: I object.

Q. (BY MR. LAROSA) Correct?

MS. GRAY: Mr. Herrera's (unintelligible) answer.

A. No. You're saying it has to be a trophy, and --

THE COURT: I'll overrule.

Just answer the question, please.

A. I don't believe it is --

Q. (BY MR. LAROSA) The forum invited people to post big bucks, big bulls and other big game?

[440] A. But everyone thinks theirs is big, but yeah.

Q. Okay.

A. That's what it says.

Q. And that's not the first time you posted at Monster Muleys, is it?

A. No.

Q. And you also post on your Facebook page, don't you?

A. I have all kinds of stuff.

Q. And you posted lots of animals there?

A. Yeah, I'm a hunter, an Indian.

Q. To be clear, this is the area where the kill took place, is it not?

A. That's what it's marked on here as, and I'll agree to that, yeah. That looks like the area it was killed. It looks like the burnt-out -- burnt-out trees there, and maybe those are the trees behind that that were kind of going over the other side of the ridge.

Q. And you just testified you pulled the trigger when you were in this area, correct?

A. Yes, I did.

Q. You previously told others that when you did that, you knew you were in the state of Wyoming, hadn't you?

A. No, I didn't. Because I believe I was on the [441] res to this day.

Q. You gave an interview to the Billings Gazette, did you not?

A. Yes, I did.

Q. And you told them you knew when you pulled the trigger, that you were on -- in the state of Wyoming, did you not?

A. I don't think I was quoted as saying anything, but I'd have to review.

Q. Did he get his information from you?

A. We were talking, yeah. Most of his information.

Q. And you told him that, didn't you?

A. I cannot -- I don't recall saying that exact wording, or even thinking I was in Wyoming. That would be a violation.

MR. LAROSA: May I have a moment, please?

Q. (BY MR. LAROSA) In that same interview you did tell him that you killed three elk, didn't you?

A. Yeah. I mean -- yeah, I think I did.

Q. And you told him you saw them in the vicinity of Eskimo Creek, right?

A. As it was labeled by Wyoming, state of Wyoming.

Q. And you told them --

MS. GRAY: Your Honor, may I ask (unintelligible) ask questions in detail about something [442] that Mr.

Herrera hasn't seen, can he see a copy -- (unintelligible).

Q. (BY MR. LAROSA) Do you recall speaking with a reporter?

A. Brett French, yes.

THE COURT: Overruled. You can question on this line.

Q. (BY MR. LAROSA) And did you read the article when it came out?

A. I -- yes, I did, but I didn't -- I don't really like reading it, because there's a lot of bad things that come after as comments and --

Q. You told him it was Ronnie's first elk?

A. I believe we both did. I -- I'd have to read it again and think about it. It was a while ago.

Q. Was it Ronnie's first elk?

A. It was Ronnie's first elk.

Q. And did you tell Dustin Shorma it was Ronnie's first elk?

A. I might have.

Q. Did he --

A. I wouldn't argue against it.

Q. And you told -- you told the reporter that it took a while to pack it out, correct?

A. Took us eight hours to pack them out, actually. [443] I had two legs. I had two backstraps and a head. And the snow, I think --

Q. Your testimony is he got the other thing you said wrong?

A. What's that?

Q. That you knew you were in Wyoming when you took the shot.

A. I think we were on the Crow Reservation.

Q. This hunt happened in January -- on January 18th, correct?

A. It sounds accurate.

Q. And the elk that you're wearing and the elk you're kneeling beside is the one you killed?

A. Yeah.

Q. And the others were killed as part of what you described as a collective action, us working together, correct?

A. I don't -- I mean, I don't get what that question says.

Q. You testified when Ms. Gray was asking about hunting --

A. Everyone picked --

Q. -- hunting is a collective thing you do together. You do it all at the same time. You work with each other. That was your testimony, correct?

[444] A. Yeah, I would have to explain that the way we are shooting, in order to answer this question accurately, if you don't mind.

Q. The -- but you did say that? I'll ask --

A. Yeah, we're -- we're on -- we're a hunting party. We're hunting.

Q. Yeah. Okay.

A. And, yeah, we're all killing and succeeding.

Q. And that's what happened on this occasion, is it not?

A. Yes.

MR. LAROSA: I have no more questions.

THE COURT: Any redirect?

MS. GRAY: Nothing further, Your Honor.

THE COURT: All right. You may step down.

MS. GRAY: Your Honor, subject to the issue we discussed of offers of proof, the defense rests.

THE COURT: All right. Let me have counsel approach.

(Inaudible sidebar conference.)

THE COURT: All right. Ladies and gentlemen, as you guessed, we're not going to get through today. So -- but I am going to go ahead and we're going to take an early recess for the jurors. So I will be releasing you. At this time there's some matters the * * *

Excerpt from State's Response to Motion to Dismiss
(Circuit Court of Sheridan Cty. Aug. 6, 2015)

* * *

It is no surprise that he makes this claim, because the acts for which he is charged occurred in the Big Horn National Forest, which is still owned by the United States, and which comprised hunting districts of the Crow tribe at the time the Fort Laramie Treaty was negotiated. *See Repsis*, 73 F.3d at 985-86 (noting that the lands ceded in the 1868 Treaty included the Big Horn National Forest); Def.'s Br. at 8 (citing to the 1851 treaty).

* * *

Motion for Status Conference re Evidentiary Hearing (Circuit Court of Sheridan Cty. Aug. 6, 2015)

COMES NOW the State of Wyoming, by and through its undersigned attorney, and hereby moves this court for a status conference to discuss further proceedings in this matter. The filings and briefs in this matter by both parties indicate that an evidentiary hearing should occur, so that evidence admissible under the rules may be received and considered where relevant to the multiple issues before the court. The timing and length of such a hearing needs to be discussed with the court. A status conference would allow this to happen.

The State asks that its motion be granted. A proposed order is attached.

RESPECTFULLY SUBMITTED this [handwritten: 6th] day of August, 2015.

[handwritten: signature]
Christopher LaRosa #6-4025
Deputy County and
Prosecuting Attorney
148 S. Brooks St.
Sheridan, Wyoming 82801
Tel (307) 674-2580;
Fax (307) 674-2585

CERTIFICATE OF SERVICE

I, Christopher LaRosa, Deputy County and Prosecuting Attorney, Sheridan County, Wyoming, do hereby certify that I served a true and correct copy of the within and foregoing Motion of Extension of Time this [handwritten: 6th] day of August, 2015, by depositing a copy thereof in the United States Mail, postage prepaid and duly addressed to the following:

Kyle A. Gray & Steven T. Small	[✓]	U.S. Mail
Holland and Hart	[ ]	Facsimile
400 N. 31st Street, Suite 1500	[ ]	Hand
P.O. Box 639	[ ]	Delivery
Billings, MT 59103	[ ]	FedEx

[handwritten: signature]
Christopher LaRosa

Exhibit A to Defendant's Motion for Reconsideration (Circuit Court of Sheridan Cty. Apr. 12, 2016)

Excerpt from Wyo. Game and Fish Dep't Investigative Report

Wyoming Game and Fish Department Investigative Report	Case Number: 33114/16
	Reporting Officer: Dustin Shorma
Sheridan Region - 700 Valley View Dr., Sheridan, WY 82801	Report Date: 5/20/14
Telephone: (307) 738-2455 Fax: (307) 672-0594	Violation Date: 1/18/14

* * * elk)" and a citation for "Accessory to: Take a Big Game Animal (bull elk) During a Closed Season." Colton signed and accepted both citations.

I then asked Colton if he would return the elk head his son had shot. Colton said he would, so we followed him over to his residence in Crow Agency. Colton stepped inside and retrieved a 5x5 bull elk head that I identified from the photographs recovered off the Monster Mulies web page. The head was seized on seizure tag number #19430. I gave Herrera a receipt from the seizure tag from the bull as well as my business card and advised him that he could contact me if he had any questions.

INTERVIEW WITH RONNIE FISHER

On October 2, 2014 at approximately 12:30 hours, Special Agent Dave Rippeto with the US Fish &

Wildlife Service and I were able to contact Ronnie Fisher via cell phone. Fisher was shopping with his wife in Billings, MT at the time and was not home. Dave told Fisher that we would like to talk to him and if he got back to give us a call.

We made several attempts to locate Darren "DL" Singer and Ronnie Fisher. None of the attempts were successful at the time.

At approximately 14:01 hours I left this message on DL Singer's Facebook page:

"DL, I would like to meet with you to talk over some issues. Please call me, it is important 307-751-2438,"

Thank you,

Dustin Shorma

At approximately 14:10 hours, Fisher called back stating he was at his parents residence of 294 Pretty on Top Lane, in Crow Agency and would be willing to meet with us.

We arrived and met Fisher at approximately 14:35. We introduced ourselves and asked him if we could talk about his elk hunting. Fisher agreed, and provided us with the following information:

1. He had hunted elk several times since the beginning of the year. Usually he hunts the Wolf Mountains but also hunted the Bighorns.

2. He only killed one elk and that was while hunting in the Bighorns.

3. Clayvin Herrera had texted him and asked him if he wanted to go hunting the following morning. Clayvin apparently had observed some elk that evening.

4. Ronnie knows Colton and Clayvin Herrera from playing basketball.

5. They left at 5:00 hours the following morning from Crow Agency. The drove to Wyola, then up the Little Horn Road to the Rotten Grass Road.

6. When they got to the face of the mountain, they observed a bunch of elk on the Montana side of the state line. They tried driving up to the face but a snowdrift blocked their progress. They then walked the rest of the way.

7. Ronnie didn't know the area or how close they were to the state line. They jumped a couple fences on their way up.

8. Ronnie was in the lead. Also hunting that day were Colton Sr., Colton Jr., Clayvin, Daniel Ceasley and "DL" Singer.

9. The large group of elk moved across another ridge between the hunters to the south west (edge of the West Fork of the Little Horn).

10. Ronnie saw the three bulls "in the willows." DL Singer had walked past the group and was up above the group. Everyone shot at the bulls except DL and Daniel.

11. Ronnie guessed he was about a mile into Wyoming.

12. Clayvin made a comment when they got to one of the bull about "practicing their treaty rights."

13. They spent the whole day out there hunting and packing meat. When the elk were dropped, they called for Barry Whiteman to come and assist them.

14. DL Singer is a cousin to Ronnie.

15. Some "pieces" of the elk that they left were "wounded". Ronnie packed out two hindquarters and a front quarter along with the head. At the bottom, all the meat was split up, Ronnie got a back strap and a hindquarter.

16. Ronnie didn't know there was a fourth bull. They only saw three bulls.

We asked Ronnie what he shot the bull with. He told us he used his 7mm and said he didn't have it. We talked a little bit about the case and then discussed the Lacey Act. Ronnie then said he had the rifle with him and produced a Howa Model 1500 with a Leopold 3x9 scope. The serial number on the rifle was B005762. The rifle was photographed and returned to Ronnie.

We then followed Ronnie out to his in-laws residence on Reno Creek Road. Ronnie drove past the houses and recovered the bull elk head from a truck box sitting in a "bone yard" for the ranch. The head was seized under seizure tag #863495. I advised Ronnie I could issue him a citation if he would accept it and he said he would.

Ronnie Fisher was issued one citation for "Take Antlered a Big Game Animal."

Investigation pending.

State's Trial Exhibit 6

Email from Clayvin Herrera dated Jan. 13, 2014

* * *

From: Clayvin Herrera * * *
Date: Mon, Jan. 13, 2014 at 5:26 PM
Subject: poaching
To: wgfdwebmaster@wyo.gov * * *

Greetings,

I would like to contact anyone who has an interest in poachers. Especially poachers near the border with the Crow Indian Reservation in Montana. We would like to start building relationships with our neighbors that would be mutually beneficial. Please email me back or call me at * * *. I would like to help in any way we can to catch violators near our mutual borders. Thanks.

Clayvin Herrera
Captain
Crow Nation Fish & Game
* * *

State's Trial Exhibit 8

Page and Photographs from MonsterMuleys.com

Good Year on the Crow Reservation

"Good Year on the Crow Reservation" Photo provided by: Clayvin Herrera

Clayvin Herrera scored quite well (top 2 photos), as did Ronnie Fisher (3rd pic), Clayvin's nephew, Colt Jr., and sister, Adree (bottom photo). It was a good year on the Crow Reservation in Montana.

State's Trial Exhibit 9
Excerpt of Email Chain Between
Dustin Shorma and Clayvin Herrera

Dustin Shorma * * * Mon, Feb 10, 2014 at 7:30PM

To: Clayvin Herrera * * *
Bcc: Scott Adell * * *

Hey Clayvin,

I was wondering if you could help me on a poaching case I've been working on.

Have you had any bull elk heads come in the past week with someone wanting a transportation tag?

I had a bull elk poached near the WY/MT line. The head and a small amount of back strap was removed, the rest was left to rot. This would have happened late Friday night, early Saturday morning. I was through there Friday afternoon and didn't see anything, but did see the footprints late Saturday night while on patrol. I was too dark to find anything then so I just found the dead bull this evening.

It is sad to see someone shoot a bull during the winter and leave all the meat to go to waste. If you hear anything or know anyone with a bull elk head (no body) they want tagged would you mind contacting me?

Thanks for all your help,

Dustin Shorma

--

Dustin Shorma
Game Warden
P.O. Box 27
Dayton, WY 82836

Clayvin Herrera * * * Mon, Feb 24, 2014 at 9:45AM
To: Dustin Shorma * * *

Dustin,

Hey sorry I haven't responded. I have been out of the office for a couple weeks on the road promoting bison hunting in Salt Lake City, Utah.

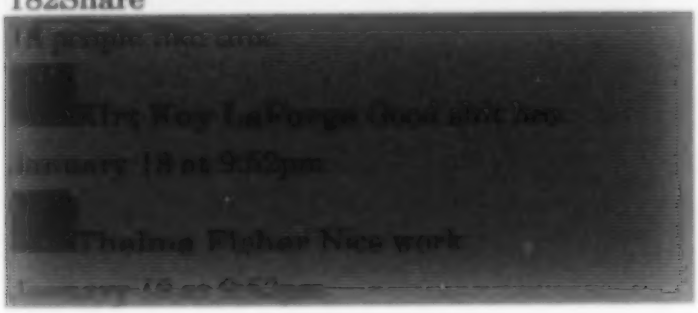
Give me some good locations and I can throw them on a map as well as the dates.

Let's get these poachers!

State's Trial Exhibit 10

Photographs from Facebook

182Share



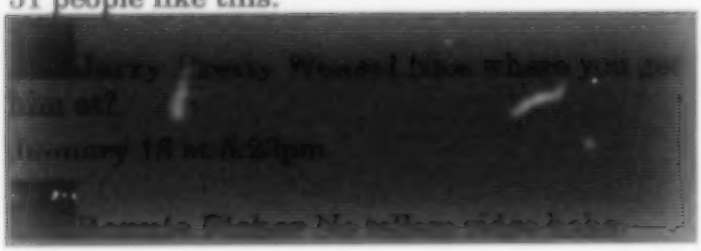
Ronnie Fisher

January 18

First b··ll — with Jerry Pretty Weasel and Daniel Ceasley.

5119Share

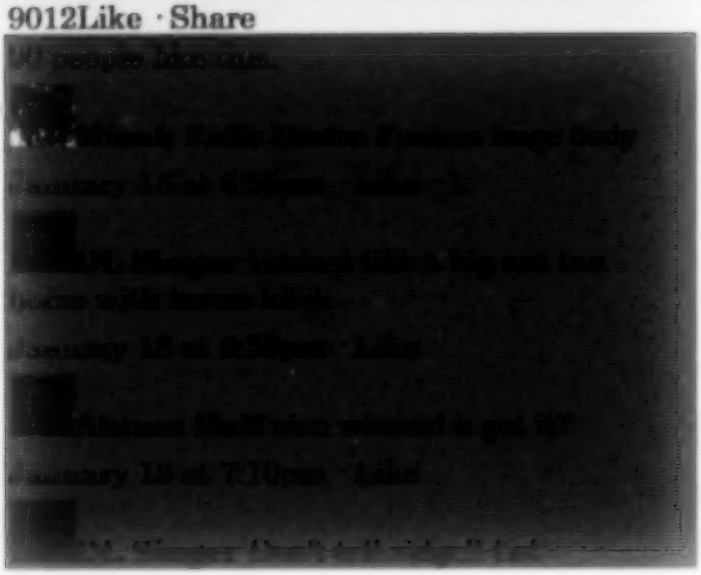
51 people like this.



State's Trial Exhibit 11

Photograph from Facebook

9012Like · Share



State's Exhibit 32

Redacted Version of Appellant/Defendant Herrera's Opening Brief in District Court, Fourth Judicial District (Mar. 7, 2016)

* * *

[Redacted by State in Exhibit]

II. Statement of Case

A. Nature of the Case, Course of Proceedings and Disposition Below.

1. Nature of the case.

This is a misdemeanor criminal proceeding. (R.1-2). The State of Wyoming is prosecuting Herrera, who the State alleges in January 2014 illegally took an elk in the BHNF (and aided other Crow tribe members in doing the same) in violation of Wyoming's closed-season and hunting licensing laws, W.S. § 23-3-102(d) and§ 23-6-205. (*Id.*).

[Redacted by State in Exhibit]

B. Statement of the Facts.

Herrera is an enrolled member of the federally-recognized Crow Tribe. (R.303, 306). He resides at St. Xavier, Montana, which is located on the Crow Reservation. (R.1-2). In January 2014, Herrera (a deputy game warden for the Crow Tribe) and several other tribal members decided to hunt for elk on Crow Reservation lands, intending to return with meat to help feed their families over the winter months. (R.838). Petitioner and his fellow tribal hunters spotted several elk on the Reservation in the vicinity of Eskimo Creek, and tracked them on foot through the snow. At some point, the elk—with the tribal

hunters in pursuit—apparently crossed over the Montana-Wyoming border and into the Bighorn National Forest. Three elk were shot, quartered, and packed out of the mountains on the backs of the tribal hunters, who later distributed the elk meat among their families and other tribal members.[2]

[Redacted by State in Exhibit]

Dated this 7th day of March, 2016.

[handwritten: signature]
Kyle A. Gray (#5-2297)
* * *

[2] [Redacted by State in Exhibit] some of these facts are not in the record. Herrera certifies that if such a hearing were to be held, these facts would be established. [Redacted by State in Exhibit] While Herrera is not certain the elk were shot in Wyoming rather than on the Crow Reservation, for purposes of this appeal he does not contest that the elk were taken on the Bighorn National Forest.

Exhibit A to Appellee's Supplemental Brief in *Herrera v. Wyoming*, No. CV-2016-000242, Fourth Judicial District Court, Sheridan Cty. (Jan. 30, 2017) (Amended Complaint, *Crow Tribe of Indians v. Repsis*, No. 92-cv-1002 (D. Wyo. Aug. 5, 1992))

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
CASPER DIVISION

No. 92-cv-1002

CROW TRIBE OF INDIANS and THOMAS L. TEN BEAR,
Plaintiffs,

v.

CHUCK REPSIS, Individually, FRANCIS PETERA, Individually and as Director of the Wyoming Department of Fish and Game, and FRANCIS PETERA, Individually and as Director of the Wyoming Game and Fish Commission,
Defendants.

Filed: Aug. 5, 1992

AMENDED COMPLAINT

COME NOW Plaintiffs above-named, through counsel, and for their complaint against Defendants and each of them, state and allege as follows:

JURISDICTION

1. Jurisdiction of this action arises under 28 U.S.C. §1331, because it involves a federal question, under 28 U.S.C. §1332 as an action against another state, under 28 U.S.C. §1362, as an action brought by an Indian Tribe, and under 28 U.S.C. §2201 as an action seeking declaratory relief.

PARTIES

2. Plaintiff Crow Tribe is successor in interest to the Crow Tribe who was a party to the Fort Laramie Treaties of 1851 and 1868. It is acting in its own behalf and in behalf of its members, namely members of the Crow Tribe. Plaintiff Thomas Ten Bear is a lawful member of the Crow Tribe of Indians.

3. Defendants are engaged in the promulgation and enforcement of hunting and fishing laws and regulations in the State of Wyoming. At all times relevant hereto, the acts of the specified defendants were carried, out by their duly authorized officers, employees, and agents, and were ratified and approved by Defendants, and each of them.

COUNT I: DECLARATORY JUDGMENT: OFF-RESERVATION HUNTING RIGHTS

4. This action is founded on certain Indian Treaties with The Crow Tribe of Indians, approved by the Congress of the United States. Pursuant to the Fort Laramie Treaties of 1851 and 1868, Plaintiffs hold hunting and fishing rights on certain off-reservation lands ceded to the United States, and hold exclusive hunting and fishing rights on Indian and trust lands within the exterior boundaries of the reservation. Article 5 of the 1851 Treaty provides:

> In making selections of territories the tribes do not abandon or prejudice any rights or claims they may have in other lands and do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country described.

A copy of said treaty is attached hereto as Exhibit "A", and is incorporated by this reference as if fully set forth herein. Pursuant to the Fort Laramie Treaty of 1868, Plaintiffs continued to retain said rights, Article 4 of said treaty providing as follows:

> Crows agree to make above described area their permanent home and not to settle elsewhere. But shall have right to hunt on the unoccupied lands of the United States so long as game may be found thereon . . . .

A copy of said treaty is attached hereto as Exhibit "B", and is incorporated by this reference as if fully set forth herein.

5. The above-referenced treaties reserve to Plaintiffs unrestricted hunting and fishing rights on all of the ceded lands which have not since that time been patented and appropriated to private ownership, including but not limited to National Forest lands, and they reserve to Plaintiffs exclusive hunting and fishing rights on Indian and trust lands within the exterior boundaries of the reservation.

6. All subsequent agreements and treaties between the Crow Tribe and the United States have ratified and approved said treaties, at no time has the United States Congress expressed any intention to abrogate them or in any way to extinguish the rights

so reserved, and said hunting and fishing rights remain to this date in full force and effect.

7. The above-referenced treaties bind the State of Wyoming, its agents, employees and their successors in office, under the Supremacy Clause, U.S. Constitution, Art. VI, clause. 2, which imposes upon the states the obligation to observe and carry out the provisions of treaties of the United States.

8. On or about November 14, 1989, Defendant Repsis, under color of state law, charged Plaintiff Ten Bear, a member of the Crow Tribe of Indians, with shooting an elk on National Forest land which was part of the land ceded to the United States by the Fort Laramie Treaties, without having first purchased a Wyoming hunting license. The Forest Service land on which the alleged offense took place was unoccupied lands of the United States. Plaintiff Ten Bear was actually detained and issued a citation while on land that is part of the Crow Indian Reservation in the State of Montana.

9. On or about December 4, 1989, Plaintiff Ten Bear, through counsel, filed a Motion to Dismiss the charges based on the treaty rights above-stated, on the ground that he was entitled to hunt on said land without being required to buy a Wyoming hunting license, On July 17, 1990, County Court Judge Duane C. Buchholz denied said motion, holding that he did not have any treaty-reserved, off-reservation hunting rights, and that he needed to qualify as a non-resident hunter before taking "Wyoming game". A true and correct copy of said Memorandum of Decision is attached hereto as Exhibit "C". On or about October

25, 1990, Mr. Ten Bear was found guilty of illegally killing an elk, in violation of Wyoming's game laws.

10. The United States Congress has never authorized the State of Wyoming to impose licensing fees on Plaintiffs or in any way to interfere with or impair Plaintiffs' treaty-reserved, off-reservation hunting and fishing rights. Defendants may not enforce licensing or other state hunting laws and regulations on Plaintiffs when they are exercising their treaty-based hunting rights in such protected areas, as any such interference violates the Fort Laramie Treaties.

COUNT II: DECLARATORY JUDGMENT: ELK-PROOF FENCE

11. Plaintiffs reallege each and every allegation contained in Count I hereof and incorporate them by this reference into this Count II as if fully set forth herein.

12. The State of Wyoming and its agents and employees have erected an "elk fence" approximately six miles long from a point on the Little Big Horn River in Section 20, Range 89 West running south and east to a point at or near the northwest corner of Section 31, Range 88 West, as depicted by the "x"es on the attached Exhibit "D". The purpose and effect of said fence is to prevent elk herds from following their natural migratory course from higher summer elevations on the eastern slopes of the Big Horn Mountains, to areas that would otherwise constitute part of their winter range in southern Montana, including but not limited to lands within the Crow Indian Reservation.

13. Plaintiffs are informed and believe that the United States Congress has never authorized the construction, management or maintenance of said elk-proof fence, or authorized Defendants in any way to maintain such a fence in such a way as to interfere with or impair Plaintiffs' treaty-reserved hunting and fishing rights.

14. Plaintiffs' hunting rights may not be diminished by unilateral choices of the State to put parcels of public land to uses incompatible with Plaintiffs' continued exercise of their usufructuary rights, Defendants bear a duty to refrain from actions interfering with those rights, and the State constructed said fence subject to that duty. Defendants may not subordinate Plaintiffs' treaty-based hunting rights to those of the citizens of Wyoming or force treaty Indians to yield their own protected interests in order to promote the welfare of Wyoming citizens.

15. Since the effect of said fence is to interfere with Plaintiffs' access to protected off-reservation hunting areas, and the number of elk present on protected on and off-reservation hunting areas, Defendants' continued maintenance of said fence violates their duties under the treaty. The management and supervision of said fence is therefore unlawful in that it constitutes the maintenance of a device which gives them exclusive possession of the subject elk and elk hunting places, and has the effect of preempting Plaintiffs' treaty-based hunting rights.

16. Notwithstanding Plaintiffs' rights under the treaties, and regardless of whether or not the maintenance of said fence violates Plaintiffs' hunting

rights under the treaties, the elk of the Big Horn National Forest (including but not limited to those which would otherwise winter in southern Montana if not blocked from doing so by artificial means) are a natural resource which may not be wholly owned by, or preserved solely for the inhabitants of, the State of Wyoming. Defendants have an affirmative duty to abstain from managing said herds in such a way that identifiable elk are prevented from actually reaching those places. But for Defendants' maintenance of said elk-proof fence, certain of said elk would otherwise be destined for areas in Montana, including but not limited to areas within the Crow Reservation. Therefore, whether or not Plaintiffs are entitled to share in the elk resource by virtue of their rights under the treaties, they are entitled to an equitable apportionment thereof.

17. The construction and maintenance of said fence is also unlawful in that it, in combination with natural barriers, wrongfully fences in federal land in violation of the Unlawful Enclosures of Public Lands Act, 43 U.S.C. §1061 et. seq.

18. The actions of Defendants as above-described are ultra vires acts beyond their lawful jurisdiction and deprive Plaintiffs of rights, privileges and immunities granted to them by laws and treaties of the United States which permit Plaintiffs to be free from the exercise of state hunting and fishing laws and regulations except where such freedom has been specifically withdrawn by the United States Congress. The Fort Laramie Treaties prevent Defendants from enforcing regulations, or otherwise interfering with Plaintiffs' treaty-reserved hunting rights, both on

their reservation and on off-reservation unoccupied lands, including but not limited to National Forest Service lands.

19. The efforts of Defendants to so impair the exercise of Plaintiffs' hunting rights have caused damage to Plaintiffs and show the existence of a justiciable controversy between Plaintiffs and Defendants within the jurisdiction of this Court.

COUNT III: INJUNCTIVE RELIEF

20. Plaintiffs reallege each and every allegation contained in Counts I and II hereof and incorporate them by this reference into this Count III as if fully set forth herein.

21. Defendants' continued enforcement of hunting and fishing regulations which violate Plaintiffs' rights under the treaties, and their continued maintenance of the elk-proof fence, has and will continue to cause damage to Plaintiffs and other members of the Crow Tribe that is otherwise irreparable.

22. Plaintiffs have no plain, speedy, or adequate remedy at law for Defendants' actions, because the loss of hunting rights resulting therefrom is impossible of monetary measurement, and since in the absence of injunctive relief, Plaintiff Crow Tribe's members will have to resort to a multiplicity of actions each time any of them are faced with having to defend a prosecution based on Defendants' unenforceable hunting or fishing regulations.

23. Injunctive relief is therefore necessary to prohibit Defendants and each of them, and all of their agents, employees and successors in office, from enforcing hunting regulations or maintaining fences

or other artificial obstructions, which violate the protected hunting rights of Plaintiffs and other members of the Crow Tribe under the Fort Laramie Treaties, in order to prevent an irremediable loss of hunting rights preserved by treaty and to prevent further repeated judicial proceedings against Plaintiff Crow Tribe's members.

WHEREFORE, PLAINTIFFS PRAY for relief as follows:

a. To issue a declaratory judgment declaring the rights of the parties hereto under the laws and treaties between the Crow Tribe of Indians and the United States and under the provisions of the Wyoming Game and Fish laws and regulations;

b. For judgment declaring that, pursuant to the Fort Laramie Treaties, Plaintiffs retain their treaty-reserved, off-reservation hunting and fishing rights on ceded, unoccupied and public lands, and that such rights preclude state regulation;

c. For judgment declaring that Defendants, and all of their agents, employees and successors in office, may not interfere with the exercise of Plaintiffs' hunting and fishing rights;

d. That, on final hearing, Defendants and each of them, and all of their agents, employees and successors in office, be permanently enjoined from enforcing Wyoming hunting and fishing laws and regulations against Plaintiffs and other members of the Crow Tribe of Indians, for their exercise of hunting and fishing rights on the ceded, unoccupied lands as protected and reserved under the Fort Laramie Treaties;

e. That, on final hearing, Defendants and each of them, and all of their agents, employees and successors in office, be permanently enjoined from maintaining the elk-proof fence depicted by the attached Exhibit D or any other such fence erected in its place, or obstructing by any other means the natural migration of the Big Horn Mountain elk herds to their chosen winter range.

f. For Plaintiffs' reasonable fees and costs necessarily incurred in prosecuting this action, and for such other and further relief as this Court may deem just and equitable.

DATED this [handwritten: 3rd] day of [handwritten: August], 1992.

[handwritten: signature]
THOMAS E. TOWE
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that the foregoing AMENDED COMPLAINT was duly served upon the following parties or their attorneys of record by depositing true and correct copies thereof in the United States Mail, postage prepaid, at their last known address this [handwritten: 3rd] day of [handwritten: August], 1992.

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No. 17-532

In the
Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ of Certiorari to the District Court of Wyoming, Sheridan County

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QUESTION PRESENTED

Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family.

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INTRODUCTION

This case presents the straightforward question of whether Indian treaties mean what they say. In 1868, the Crow Tribe of Indians entered into a treaty with the United States in which the Tribe ceded to the federal government the vast majority of its aboriginal territory, which spanned large swaths of present-day Montana and Wyoming. The Tribe retained a portion of its land for the establishment of the Crow Reservation, which is located in southern Montana on the border between Montana and Wyoming. The Tribe also expressly reserved the right to hunt on the lands it had ceded to the United States. Specifically, the treaty provides that the Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." For well over a century, Crow members relied on that binding language to hunt on off-reservation lands, including in the Bighorn National Forest in northern Wyoming, which is adjacent to the Crow Reservation and was established in 1897 from lands that the Tribe ceded to the United States.

Petitioner Clayvin Herrera is a member of the Crow Tribe who went hunting on the Crow Reservation with other members of the Tribe in January 2014. After spotting a small herd of elk, the group pursued the animals and eventually crossed the state line into the Bighorn National Forest in northern Wyoming. The group shot and killed three elk in that federal forest and carried the meat back to the

Reservation in Montana to help feed their families and other tribal members over the winter.

The state of Wyoming—Respondent here—convicted Petitioner of two crimes under Wyoming law for unlawfully hunting elk in the Bighorn National Forest. Before trial, the Wyoming trial court prohibited Petitioner from asserting his federal treaty right as a defense to prosecution, and a Wyoming appellate court affirmed that decision post-trial. Both courts concluded that the Tribe's 1868 hunting right had been categorically abrogated by Wyoming's admission to the Union in 1890 or, alternatively, by the mere establishment of the Bighorn National Forest in 1897, which ostensibly rendered that federal land no longer "unoccupied." In addition, after *sua sponte* raising the question, the appellate court concluded that, under federal principles of issue preclusion, Petitioner was barred from raising the 1868 Treaty's hunting right because, some two decades earlier, a federal civil suit to which Petitioner was not a party resulted in a determination that the treaty right had been abrogated. *See Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1994), *aff'd*, 73 F.3d 982 (10th Cir. 1995). The Wyoming Supreme Court denied review.

The decision below cannot stand, for nothing has abrogated the hunting right reserved to Petitioner and the Crow Tribe under the 1868 Treaty. The 1868 Treaty never mentions Wyoming's statehood as an event that would terminate the Tribe's hunting right, and the 1890 act of Congress admitting Wyoming into the Union is completely silent on Indian treaty rights. That means Wyoming's statehood could only have

impliedly terminated the Tribe's hunting right, and as this Court made clear in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), Indian treaty rights "are not impliedly terminated upon statehood." *Id.* at 207. Nor did the establishment of the Bighorn National Forest, in and of itself, render that vast land "occupied," thereby extinguishing the Tribe's hunting right. Just the opposite, the presidential proclamation creating the Bighorn National Forest expressly prohibited "entry or settlement" on that land. And the notion that issue preclusion applies here is wrong for any number of reasons, including that *Mille Lacs*, which postdated the *Repsis* case invoked by the court below, changed the legal framework for assessing the validity of Indian treaty rights.

The decision below is therefore profoundly wrong and profoundly unsettling. Affirmance not only would strip a sovereign Indian tribe of a longstanding, treaty-guaranteed right of enormous practical and spiritual significance; it would threaten the rights of numerous other Indian tribes that long ago reserved similar off-reservation protections in their own treaties with the United States. That unjust and far-reaching result is particularly misguided given that the only two parties to the 1868 Treaty—the United States and the Crow Tribe—agree that the Crow's hunting right survived Wyoming's statehood and the establishment of the Bighorn National Forest. This Court should accordingly reverse the decision below and confirm that Petitioner may assert the off-reservation treaty hunting right promised to the Crow Tribe over 150 years ago.

OPINIONS BELOW

The Wyoming Supreme Court's order denying review is unreported but reproduced at Pet.App.1-2. The Wyoming District Court's opinion is unreported but reproduced at Pet.App.3-35. The Wyoming Circuit Court's opinion is unreported but reproduced at Pet.App.36-43.

JURISDICTION

The Wyoming District Court issued its opinion on April 25, 2017; the Wyoming Supreme Court denied review on June 6, 2017; and a petition was timely filed. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

A. Historical and Legal Background

1. The Crow Tribe of Indians originated in Canada and "lived originally as Stone Age hunters." *Montana v. United States*, 450 U.S. 544, 547-48 (1981); Robert H. Lowie, *The Crow Indians* xv (1935) (Lowie). More than 300 years ago, the Tribe migrated to what is now southern Montana and northern Wyoming. *See Montana*, 450 U.S. at 547-48; Joseph Medicine Crow, *From the Heart of the Crow Country* 13 (1992). In its new land, hunting remained central to the Tribe's lifestyle; indeed, the Tribe considered "[h]unting of big game" to be "man's chief task," and "basic for many other aspects of life." Lowie 72.

By the mid-1800s, the westward migration of non-Indian settlers and conflicts between various tribes in the region, including the Crow, led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851. *Montana*, 450 U.S. at 547-48, 557; *see* First Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749 (1851 Treaty) (reprinted in 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 594-595 (1904) (Kappler)).[1] In the 1851 Treaty, "the signatory tribes acknowledged various designated lands as their respective territories." *Montana*, 450 U.S. at 547-48. In particular, the Treaty "identified approximately 38.5 million acres as Crow territory," which spanned Montana and Wyoming. *Id.* at 548. The 1851 Treaty made explicit that "the tribes did not 'surrender the privilege of hunting' ... [on] any of the lands" described. *Id.* (quoting Kappler 595). The United States also promised the signatory tribes $50,000 in merchandise and animals annually for ten years. Kappler 595.

The ensuing years witnessed ever-increasing encroachment by non-Indian settlers on Indian lands and resulting conflicts between non-Indians and Indians. Consequently, in 1867, Congress established the "Great Peace Commission," which was authorized to make treaties with the Indians that would "remove" the causes of conflict and "secure ... frontier settlements," principally by moving Indian tribes to "one or more reservations." *Report to the President by the Indian Peace Commission* 26-27 (Jan. 7, 1868).

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[1] In 1825, the Crow had signed a "friendship" treaty with the United States. Treaty with the Crow Tribe, Aug. 4, 1825, 7 Stat. 266.

In November 1867, the Commission met with Crow leaders. Commission president Nathaniel Taylor explained that, among other things, "the white people are rapidly increasing and are taking possession of and occupying all the valuable lands." Inst. for the Dev. of Indian Law, *Proceedings of the Great Peace Commission of 1867-1868* 86 (1975) (*Proceedings*). Taylor accordingly presented a "plan to relieve [the Tribe] ... from the bad consequences of th[e] state of things and to protect [it] from future difficulties." *Id.* Taylor proposed that the United States would "set apart a tract of your country as a home for yourselves and children forever, upon which your great Father will not permit the white man to trespass" and on which Tribe members would learn to farm. *Id.* at 86-87.[2] The United States would then "buy" the Tribe's remaining land but, Taylor stressed, "leav[e] to [the Tribe] ... the right to hunt upon" that ceded land "as long as the game lasts." *Id.* at 86.

Taylor's proposal was met with skepticism. The Crow leaders noted the federal government's failure to comply with the 1851 Treaty. *See id.* at 88 ("We did not get the goods promised to us[.]"); *id.* at 91 ("You have not kept the promises made to us in the last treaty.").[3] They also emphasized the Tribe's desire to continue hunting rather than commence farming. *See id.* at 88 ("I was raised on game and I would like to live as I was raised.... We want to kill our own game and be glad."); *id.* ("You speak of putting us on a

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[2] "Great Father" referred to the President of the United States. *See Proceedings* 86.

[3] Taylor conceded the point, explaining that the promised goods "were stolen by" government agents. *Proceedings* 91.

reservation and teaching us to farm. We were not brought up to [do] that[.]"). As one explained, "There is plenty of buffalo, deer, elk, and antelope in my country." *Id.* at 91. In response, Taylor reiterated that "[y]ou will still be free to hunt as you are now." *Id.* at 90.

2. Six months later, in May 1868, the United States and the Crow Tribe signed the Second Treaty of Fort Laramie, which was ratified by the Senate and signed by President Andrew Johnson. *See* Treaty with the Crow Indians, May 7, 1868, 15 Stat. 649 (1868 Treaty). The 1868 Treaty resulted in the creation of the Crow Reservation—comprised of approximately eight million acres of the Tribe's aboriginal land—in present-day southern Montana, extending to the present-day border between Montana and Wyoming. *Montana*, 450 U.S. at 548. The Tribe ceded the remainder of its territory, including its land in present-day northern Wyoming, to the United States in exchange for payments, goods, and federal protection of its members and remaining lands. 1868 Treaty, art. IV-XII, 15 Stat. at 650-52; *see also Montana*, 450 U.S. at 547-48.

Consistent with Commissioner Taylor's repeated representations to the Crow leaders, the 1868 Treaty also expressly guaranteed hunting rights for the Tribe beyond the boundaries of the Reservation, including on the land that the Tribe had ceded in present-day Wyoming. Specifically, Article IV of the Treaty provided that while the Tribe would make the new Reservation its "permanent home" and "make no permanent settlement elsewhere," it nevertheless "shall have the right to hunt on the unoccupied lands

of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 15 Stat. at 650.

Over the next half-century, Congress ratified numerous other acts diminishing the size of the Crow Reservation to around 2.3 million acres. *See Montana*, 450 U.S. at 548. In those acts, however, Congress made clear that the rights reserved by the Tribe under the 1868 Treaty, including the off-reservation hunting right, remained intact. *See* Act of April 11, 1882, 22 Stat. 42, 43 (providing that "all the existing provisions of [the 1868 Treaty] shall continue in force"); Act of March 3, 1891, 26 Stat. 989, 1042 (providing that "all existing provisions of the [1868 Treaty] ... shall continue in force"); Act of April 27, 1904, 33 Stat. 352, 355 (providing that "[t]he existing provisions of all former treaties with the Crow tribe of Indians not inconsistent with the provisions of this agreement, are hereby continued in force and effect"); Act of August 31, 1937, 50 Stat. 884, 884 (providing that only those "Acts or parts of Acts in conflict herewith are hereby repealed," without suggesting any impact on Tribe's hunting right).[4]

3. Several months after the United States and the Tribe signed the 1868 Treaty, Congress created the Wyoming Territory. *See* Act to Provide a Temporary Government for the Territory of Wyoming, July 25,

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[4] Similarly, a 1994 law settling a dispute over the Crow Reservation's eastern boundary provided that "nothing in this Act ... shall affect or modify the terms and conditions of the [1868 Treaty]." Crow Boundary Settlement Act of 1994, Pub. L. 103-444, 108 Stat. 4632, 4642.

1868, 15 Stat. 178. Twenty-two years later, in 1890, Congress passed another act formally admitting Wyoming "into the Union on an equal footing with the original States." Wyoming Statehood Act §1, 26 Stat. 222 (1890) (Statehood Act). The Statehood Act said nothing about Indian treaty rights. Among other things, it provided that "the laws of the United States, not locally inapplicable, shall have the same force and effect within [Wyoming] as elsewhere within the United States." *Id.* §21, 26 Stat. at 226.

The Statehood Act also discussed certain land grants that the federal government would make to Wyoming. *See id.* §§4, 6, 8-11, 26 Stat. at 222-24. But as with many new states in the American West, the federal government never ceded title to vast swaths of land in Wyoming. The Statehood Act acknowledged as much, noting "[t]hat the State of Wyoming shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act." *See id.* §12, 26 Stat. at 224; *see also* Wyo. Const. art. XXI, §26 (disclaiming "all right and title to the unappropriated public lands lying within the boundaries thereof"). Among the lands that remained federally owned after Wyoming's statehood were the lands in northern Wyoming that the Crow had ceded to the United States in the 1868 Treaty.

4. In 1891, the year after Wyoming's admission to the Union, Congress enacted a statute—commonly known as the Forest Reserve Act—that authorized the President, by proclamation, to "set apart and reserve ... public land bearing forests" in "any State." Act to Repeal Timber-Culture Laws, §24, 26 Stat. 1095, 1103 (1891) (Forest Reserve Act). Congress

included express anti-abrogation language in the statute, providing that "nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands." *Id.* §10, 26 Stat. at 1099.

In February 1897, pursuant to the Forest Reserve Act, President Grover Cleveland issued a proclamation establishing the "Big Horn Forest Reserve" from federal land in northern Wyoming—*i.e.*, the area constituting the Tribe's aboriginal hunting grounds, which the Tribe had ceded to the federal government in the 1868 Treaty. Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897). The proclamation explicitly "reserved" that land "from entry or settlement," *id.* at 909, and added the following admonition: "Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation," *id.* at 910. By 1908, the reserved land was known as the "Bighorn National Forest," which it remains to this day. *See* Exec. Order No. 908 (July 2, 1908).[5]

5. Between 1868 and 1989, members of the Crow Tribe continuously hunted in the Bighorn National Forest, almost entirely free of state interference.[6] In

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[5] In 1907, Congress changed the nomenclature from "forest reserves" to "national forests." Act of March 4, 1907, 34 Stat. 1256, 1269. No legal consequences attached to this change. For clarity, this brief refers to the "Bighorn National Forest" even when addressing the pre-1907 land.

[6] In 1972, Wyoming prosecuted a Crow member for killing a deer in the Bighorn National Forest. After the member invoked the 1868 Treaty, and the U.S. Department of Interior's Field Solicitor testified that the treaty was "still valid," the state court dismissed the charges. *See* Associated Press, *Crow Indian Cites*

1989, however, Wyoming successfully prosecuted a Crow member, Thomas Ten Bear, for shooting and killing an elk in the Bighorn National Forest without a Wyoming hunting license. In response, in 1992, Mr. Ten Bear and the Tribe filed an action against two state officials in federal district court seeking a declaration that the Tribe maintained its right under the 1868 Treaty to hunt on the "unoccupied lands of the United States"—including in the Bighorn National Forest. *See Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520, 521-22 (D. Wyo. 1994).

The district court granted summary judgment to the state officials exclusively on the ground that the case was controlled by this Court's decision in *Ward v. Race Horse*, 163 U.S. 504 (1896). 866 F. Supp. at 522-24. *Race Horse* involved a materially identical treaty provision that reserved for the Bannock Indians the right to hunt on the "unoccupied lands of the United States." 163 U.S. at 517. This Court concluded that Wyoming's admission to the Union "on equal terms with the other states" abrogated the Bannock's treaty hunting right, *see id.* at 510-15, and that Wyoming's statehood terminated what the Court deemed a "temporary and precarious," rather than "perpetual," hunting right, *id.* at 508-10, 515. The *Repsis* district court acknowledged that "*Race Horse* is a much-criticized decision," that "many courts and commentators have questioned [its] continuing viability," and that "[n]o ... Congressional enactment exists which has explicitly modified relevant portions"

Treaty in Game Rap, *in* The Daily Plainsman, at 9 (Oct. 13, 1972); *Wyoming Game Charges Dropped for Crow Man*, Char-Koosta News, at 6 (Jan. 1, 1973).

of the 1868 Treaty. 866 F. Supp. at 521, 523-24. It nevertheless deemed itself bound by *Race Horse* and held for the state officials. *Id.* at 524.

The Tenth Circuit affirmed. *See Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 992 (10th Cir. 1995). Likewise following *Race Horse*, the Tenth Circuit held that the "Tribe's right to hunt reserved in" the 1868 Treaty was "repealed by the act admitting Wyoming into the Union." *Id.* (citing *Race Horse*, 163 U.S. at 514); *see also id.* at 994 (describing the treaty right as "a temporary right which was repealed with Wyoming's admission into the Union"). Indeed, the court of appeals doubled down on *Race Horse*, declaring it "compelling, well-reasoned, and persuasive." *Id.* at 994.

In a brief "alternative basis for affirmance" on an issue the district court had not reached, the Tenth Circuit stated that the Tribe's hunting right had also been abrogated by the mere establishment of the Bighorn National Forest. *Id.* at 993. In the court's view, when "Congress created the Big Horn National Forest," the land therein was "no longer available for settlement," thereby "result[ing] in the 'occupation' of the land." *Id.* Thus, the court stated, the Bighorn National Forest "ha[s] been 'occupied' since the creation of the national forest in 1887 [*sic*]." *Id.* at 994.

Mr. Ten Bear and the Tribe filed a petition for certiorari challenging the Tenth Circuit's decision, but the Court denied review. *See* 116 S. Ct. 1851 (1996) (mem.).

6. Three years later, this Court held in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), that the principal theory on which *Race Horse*

rested—abrogation of Indian treaty rights upon admission to the Union under the so-called "equal footing doctrine"—was no longer good law. *See id.* at 204-07. The Court also rejected *Race Horse*'s "temporary and precarious" language as "too broad to be useful in distinguishing rights that survive statehood from those that do not," explaining that rights reserved in Indian treaties should continue in force unless a terminating event defined in the treaty has occurred. *Id.* at 206-07. The Court further explained that "[t]reaty rights are not impliedly terminated upon statehood." *Id.* at 207; *see also id.* at 219 (Rehnquist, C.J., dissenting) (stating that the Court "effectively overrules *Race Horse*").

B. Petitioner's Prosecution and Conviction

1. Petitioner Clayvin Herrera is an enrolled member of the Crow Tribe who lives in St. Xavier, Montana, on the Crow Reservation. Pet.App.5. In January 2014, Petitioner and other Tribe members went hunting on the Reservation in Montana. Pet.App.5. As Petitioner later testified, the Tribe was in a "bad" economic state at the time, and his salary as a tribal employee had recently been cut. JA208-09. A single father, Petitioner intended to "get an elk" during the hunt so that he and his three daughters could "eat it"—indeed "[l]ive off it"—in the dead of winter. JA192, 197, 208-09. Petitioner and his companions spotted a small herd of elk on the Reservation and, while pursuing the herd through the snow, crossed the state line into the Bighorn National Forest in Wyoming. Pet.App.5. The group "shot, quartered, and packed" three elk, carried the meat "out of the mountains on the[ir] backs," and "later

distributed the elk meat among their families and other tribal members." Pet.App.5; JA255-56.

After learning about the elk hunt, Wyoming authorities traveled across state lines to the Crow Reservation in Montana to cite Petitioner for two criminal misdemeanors under Wyoming law—one for taking an antlered big game animal without a state license and during a closed hunting season, and the other for being an accessory to the same. Pet.App.5 (citing Wyo. Stat. §§23-3-102(d), 23-6-205).[7]

2. Petitioner moved to dismiss the charges, arguing that the 1868 Treaty allowed him to hunt in the Bighorn National Forest. Pet.App.36-37. The state opposed, contending as relevant here that the treaty hunting right had been categorically abrogated either by Wyoming's statehood or by the establishment of the Bighorn National Forest.

The Wyoming Circuit Court—the trial court—denied Petitioner's motion. Pet.App.36. The court "agree[d]" with the holding in *Repsis* that "Crow Tribe members do not have off-reservation treaty hunting rights." Pet.App.38. The court added that this Court's

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[7] It is undisputed that the Crow Tribe permits January elk hunting on its Reservation (*i.e.*, on the Montana side), JA156-57, and that federal law does not prohibit hunting, including treaty-based hunting, in the Bighorn National Forest, *see, e.g.*, 43 U.S.C. §1732(b); *The Forest Service Welcomes Hunters to the Nation's Forests and Grasslands*, USDA Forest Service, https://bit.ly/2OkEHXC (last visited Sept. 3, 2018). Federal law does prohibit hunting in most national parks, *e.g.*, 16 U.S.C. §256b, but "national forests are to be distinguished from national parks," *United States v. Hicks*, 587 F. Supp. 1162, 1167 (W.D. Wash. 1984). This case does not involve the exercise of treaty hunting rights in national parks.

Mille Lacs decision "had no effect on the *Repsis* decision." Pet.App.39. The trial court canceled a previously scheduled evidentiary hearing and precluded Petitioner from even mentioning his federal treaty right at trial. Pet.App.43.

Petitioner filed an interlocutory appeal with the Wyoming District Court, which was dismissed on jurisdictional grounds. Pet.App.8.[8] Petitioner subsequently sought review and a stay of his trial from the Wyoming Supreme Court, and when that court failed to act, he sought an emergency stay from Justice Sotomayor. *See* Pet.App.9; No. 15A1105. Both the Wyoming Supreme Court and Justice Sotomayor ultimately denied Petitioner's requested relief. *See* Pet.App.9.

A jury convicted Petitioner on both charges. Pet.App.9. Petitioner was ordered to pay $8,080 in fines and court costs, received a one-year jail sentence that the court suspended, and had his hunting privileges suspended in Wyoming for three years. Pet.App.9.

C. The Decision Below

Petitioner again appealed to the district court, arguing that his hunting right under the 1868 Treaty had not been categorically abrogated. Following

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[8] The Wyoming district courts are the state's trial courts of general jurisdiction, but they also serve as the appellate courts to the circuit courts, which have jurisdiction over misdemeanor cases. The district courts are single-judge courts. Review of district court decisions may only be had in the Wyoming Supreme Court. Wyoming has no intermediate appellate court system. *See About The District Courts*, Wyo. Jud. Branch, http://bit.ly/2xd73ik (last visited Sept. 3, 2018).

briefing and oral argument, the district court *sua sponte* requested supplemental briefing on the question of whether issue preclusion barred Petitioner from contending that the treaty hunting right remained valid. Pet.App.10-11.

The district court affirmed. The court first concluded that, as a matter of federal issue-preclusion principles, Petitioner was bound by *Repsis* because (1) "the issue decided in [*Repsis*]"—*viz.*, "the continued validity of the off-reservation treaty hunting right"—"[is] identical with the issue presented in the present action"; (2) the finding of "[t]he federal district court [in *Repsis*]" that "the right was intended to be temporary in nature, and ... was no longer valid" was "necessary to that judgment"; (3) Petitioner is in "privity" with the Crow Tribe, one of the *Repsis* parties; and (4) the Tribe had "a full and fair opportunity to litigate" the treaty right's validity in *Repsis*. Pet.App.13-19.[9] The court rejected Petitioner's argument that *Mille Lacs* "constitutes an intervening change in the applicable legal context since *Repsis* was decided" that would defeat issue preclusion. Pet.App.20; *see also* Pet.App.24 (stating that "the legal framework is unchanged").

The district court also announced a decision on the merits "if [issue preclusion] did not apply." Pet.App.31. The court explained that, in *Race Horse*, this Court had concluded that "the rights granted in"

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[9] The court's decision principally used the term "collateral estoppel," but this Court has observed that the term "issue preclusion" is preferable. *See Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 n.1 (2016). This brief accordingly uses the term "issue preclusion."

the nearly identical Bannock treaty "were temporary in nature" and "were not intended to survive Wyoming['s] statehood." Pet.App.32. "Similarly," the court continued, *Repsis* "found that 'the [Crow] Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union,'" and "alternatively held that the treaty rights were no longer valid, because 'the creation of the Big Horn National Forest resulted in the "occupation" of the land.'" Pet.App.32-33. Those conclusions, the district court determined, were "appropriate," and it was thus "proper" to deem the treaty right abrogated. Pet.App.34.[10]

Petitioner filed a petition for review with the Wyoming Supreme Court, which was denied without explanation. Pet.App.1-2.

After Petitioner sought this Court's review, the Court called for the views of the Solicitor General. In response, the Solicitor General advised that in the view of the United States—the counterparty to the 1868 Treaty—neither Wyoming's admission to the Union nor the creation of the Bighorn National Forest abrogated the Crow Tribe's hunting right under the Treaty. *See* U.S. Cert. *Amicus* Br.8, 12.

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[10] The circuit court had concluded that, even if Petitioner possessed a treaty hunting right, "the state of Wyoming may regulate that right in the interest of conservation." Pet.App.39. Petitioner appealed that determination, but because the district court "conclude[d] that the treaty rights are not valid," it did not "reach the conservation necessity issue." Pet.App.25 n.7; *see also* Pet.App.14 n.3 (deeming it "unnecessary to address the conservation necessity issue" because "the treaty rights do not exist"). Accordingly, that issue is not before this Court.

SUMMARY OF ARGUMENT

The 1868 Treaty provides that members of the Crow Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." That language does not remotely suggest that Wyoming's admission to the Union would terminate the Tribe's treaty hunting right, and neither the Wyoming Statehood Act nor any other act of Congress subsequently abrogated the Tribe's right. The mere establishment of the Bighorn National Forest, moreover, did not render the Tribe's aboriginal hunting lands "occupied" so as to abrogate the right. The Wyoming District Court's decision holding the treaty right categorically abrogated is demonstrably wrong, and affirming it would have dramatic consequences for the Crow and numerous other tribes that possess similar reserved treaty rights. The doctrine of issue preclusion that the Wyoming District Court raised *sua sponte* does not compel a different result.

I. Wyoming's admission to the Union did not abrogate the Crow's off-reservation hunting right. The text of the 1868 Treaty identifies four events that could terminate that right: (1) the lands become occupied; (2) the lands cease to be owned by the United States; (3) game is no longer found on the lands; or (4) peace no longer subsists between the Tribe and non-Indians. Wyoming's statehood—indeed, the establishment of any state—is conspicuously absent from that list. The negotiations preceding the Treaty, its historical context, and the practical construction

given to it by its parties confirm that Wyoming's statehood was never considered an event that would abrogate the hunting right. Likewise, the Wyoming Statehood Act contains no indication of Congress' intent to abrogate the right. To be sure, in 1896, this Court held in *Race Horse* that Wyoming's statehood abrogated a reserved hunting right in a virtually identical provision in another Indian treaty. But a century later, this Court repudiated *Race Horse* in *Mille Lacs*, holding that statehood does not impliedly terminate Indian treaty rights and that the focus should be on those events specified by the treaty as terminating a reserved right. Because Wyoming's statehood is not one of the rights-terminating events specified in the 1868 Treaty, Wyoming's admission to the Union did not abrogate the Tribe's hunting right.

Nor did the mere establishment of the Bighorn National Forest render the Tribe's aboriginal hunting land "occupied" so as to abrogate the treaty right. The text, historical record, and practical construction of the 1868 Treaty adopted by the parties show that the term "occupied" entailed actual, physical settlement of the land by non-Indian settlers. President Cleveland's 1897 proclamation establishing the Bighorn National Forest did not, by the stroke of a pen, suddenly result in that vast forestland becoming populated with non-Indian settlers. Quite the opposite: The proclamation expressly "reserved from entry or settlement" the land comprising the forest, and it warned "all persons not to enter or make settlement upon" the land. If anything, the creation of the Bighorn National Forest accomplished precisely the opposite of "occupation," both as a matter of ordinary English and as the parties to the 1868 Treaty understood that term. Regardless,

as a matter of law, President Cleveland's proclamation could not have abrogated the Crow's treaty right, because the authorizing statute disclaimed any intent to change, repeal, or modify any Indian treaties.

Affirming the decision below would have far-reaching consequences. For more than a century, the Crow Tribe correctly understood the 1868 Treaty to reserve an off-reservation hunting right that extends into northern Wyoming and the present-day Bighorn National Forest. Eliminating that right not only violates a promise made to a sovereign Indian tribe by the United States; it vitiates a hunting tradition of enormous practical and spiritual significance to the Crow. Furthermore, numerous other Indian tribes have treaties with the United States reserving hunting or similar rights, including on unoccupied, open, or unclaimed lands of the United States. If the decision below is affirmed, there is no principled reason why those rights should survive either the admission of other states into the Union or the creation of other national forests.

II. The doctrine of issue preclusion does not bar Petitioner from addressing the validity of the 1868 Treaty right. A prior judgment lacks preclusive effect when there has been a change in the applicable legal context. Here, both courts in the prior *Repsis* litigation relied exclusively on this Court's decision in *Race Horse* to hold that Wyoming's statehood abrogated the Tribe's treaty right. Following *Repsis*, however, this Court decided *Mille Lacs*, which plainly changed the applicable legal context governing the relevant issue here, *viz.*, the validity of Indian treaty rights.

Likewise, there is no basis for finding preclusion based upon the Tenth Circuit's self-styled "alternative" determination that the treaty right was abrogated by the establishment of the Bighorn National Forest. The Restatement (Second) of Judgments, which this Court routinely consults on issue-preclusion matters, provides that "alternative" determinations decided in the first instance and not affirmed on appeal do not enjoy preclusive effect given the higher likelihood of error of such determinations—a concern fully realized here given the Tenth Circuit's legally, factually, and logically flawed analysis of the "occupied" question. Moreover, in *Repsis*, the state did not even raise the argument that the forest's creation rendered the lands "occupied" until its response brief before the Tenth Circuit, thus depriving the Tribe of the full and fair opportunity to litigate the question that is necessary for issue preclusion to attach.

Applying issue preclusion would require the Court to create new law that is both far-reaching and fraught with constitutional implications. It would require the Court to determine whether, and under what circumstances, a tribal member can be bound by prior decisions involving his or her tribe, a consequential issue the Court has never addressed. It would also require the Court to approve the use of offensive issue preclusion by a state against a criminal defendant, which the Court has been reluctant to endorse even in cases involving a prior criminal judgment, as opposed to the prior civil judgment here. Because both of these issues implicate constitutional concerns, the Court's usual practice of avoiding the unnecessary resolution of constitutional questions further counsels against applying issue preclusion

here. Instead, the Court should squarely address and reject the atextual and ahistorical notion that the hunting right enshrined in the 1868 Treaty was abrogated by Wyoming's admission to the Union or the establishment of the Bighorn National Forest.

ARGUMENT

I. The Crow Tribe's Hunting Right Under The 1868 Treaty Has Not Been Abrogated.

"A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) (*Fishing Vessel*). The "starting point" in interpreting an Indian treaty is the treaty language itself. *Mille Lacs*, 526 U.S. at 206. This Court has long held that, under the Indian canons of construction, Indian treaty language must "be interpreted liberally in favor of the Indians, and any ambiguities are to be resolved in their favor." *Id.* at 200 (citations omitted); *see also, e.g.*, *Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (describing canons as "deeply rooted in this Court's Indian jurisprudence"); *Jones v. Meehan*, 175 U.S. 1, 10-11 (1899); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-53 (1832). Indian treaty language may not be given an "artificial meaning" that "might be given to it by the law and by lawyers." *Seufert Bros. Co. v. United States*, 249 U.S. 194, 199 (1919). Rather, courts must interpret an Indian treaty's words "in the sense in which they would naturally be understood by the Indians." *Fishing Vessel*, 443 U.S. at 676.

In addition to the treaty's text, courts "may look ... to the history of the treaty, the negotiations, and the practical construction adopted by the parties" to deduce its meaning. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). And although Congress may abrogate Indian treaty rights through a later-enacted statute, there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *South Dakota v. Bourland*, 508 U.S. 679, 693 (1993). Thus, "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202.

A straightforward application of these principles establishes that the off-reservation hunting right contained in the 1868 Treaty between the United States and the Crow Tribe has not been abrogated. In particular, neither Wyoming's 1890 admission to the Union nor the 1897 establishment of the Bighorn National Forest abrogated the treaty hunting right.

A. Wyoming's Admission to the Union Did Not Abrogate the Crow Tribe's Treaty Right.

1. Wyoming's admission to the Union in 1890 plainly did not abrogate the Crow's treaty hunting right. The relevant text of the 1868 Treaty—the clearest indicator of its meaning—provides that the Tribe "shall" have the continuing "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the

hunting districts." 1868 Treaty, art. IV, 15 Stat. at 650. The language of the 1868 Treaty therefore "itself defines the circumstances under which the right[]" to hunt beyond the boundaries of the Crow Reservation "would terminate," *Mille Lacs*, 526 U.S. at 207: (1) the land ceases to be "unoccupied"; (2) the land is no longer owned by "the United States"; (3) "game" is no longer "found thereon"; and (4) "peace" no longer "subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV, 15 Stat. at 650. Wyoming's statehood is conspicuously absent from that list. Simply put, "[t]here is no suggestion in the Treaty"—much less the unambiguous language required by the Indian canons of construction—"that the [hunting right] ... should end when a State was established in the area." *Mille Lacs*, 526 U.S. at 207.

The "negotiations" over the 1868 Treaty, *Choctaw*, 318 U.S. at 432, reinforce the textual reading. In discussions preceding the Treaty, Commissioner Taylor twice represented to Crow leaders that the Tribe could continue to hunt on the ceded land. *See* pp.6-7, *supra*. Although he identified some limits—*e.g.*, "as long as the game lasts"—Commissioner Taylor never so much as hinted that the Crow's ability to hunt would end if and when the land became part of a state.[11]

The "larger context that frames" the 1868 Treaty demonstrates further that neither the United States nor the Crow intended Wyoming's admission to

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[11] Taylor undoubtedly knew that statehood was a possibility. In the preceding ten years, four surrounding states that included former Indian land (Kansas, Nebraska, Nevada, and Oregon) had been admitted to the Union.

terminate the hunting right. *Mille Lacs*, 526 U.S. at 196. When the parties negotiated and agreed to the 1868 Treaty, Wyoming was not even a *territory* yet. Unsurprisingly, the 1868 Treaty never mentions the term "Wyoming," even while explicitly referencing two other U.S. territories: the Dakota Territory (where the Crow and the United States signed the 1868 Treaty) and the Montana Territory (the future location of the Crow Reservation). *See* 1868 Treaty, preamble & art. II, 15 Stat. at 649-50. Moreover, even while acknowledging those two territories, the 1868 Treaty does not reference the terms "statehood," "state," "Union," or any variation thereof. That the "entire" 1868 Treaty "is devoid of any language expressly mentioning[,] much less abrogating," the Crow Tribe's hunting right upon the admission of *any* territory to the Union—including the Dakota and Montana Territories—underscores that the Tribe's hunting right did not vanish upon Wyoming's admission to the Union. *Mille Lacs*, 526 U.S. at 195.

Nor does the 1890 Wyoming Statehood Act indicate that Congress intended to abrogate the Tribe's treaty right. The Statehood Act provides that "the State of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever." 26 Stat. at 222. "This language, like the rest of the Act, makes no mention of Indian treaty rights; it provides no clue that Congress considered the reserved rights of the [Crow Tribe] and decided to abrogate those rights when it passed the Act." *Mille Lacs*, 526 U.S. at 203; *see also Bourland*, 508 U.S. at 693. In fact, this language is materially identical to the language in

Minnesota's 1858 statehood act, which this Court examined in *Mille Lacs*. *See* 526 U.S. at 203. Accordingly, what was true in *Mille Lacs* is no less true here: "There is no ... 'clear evidence' of congressional intent to abrogate the [Crow] Treaty rights" in the Statehood Act—or in any other congressional act, for that matter. *Id.*

Finally, that the Crow Tribe's treaty hunting right survived Wyoming's admission to the Union accords with the "practical construction" of that right that has been "adopted by the parties" to the Treaty. *Choctaw*, 318 U.S. at 432. In the views of both the United States and Tribe, "[t]he Tribe's treaty rights ... survived Wyoming's statehood." U.S. Cert. *Amicus* Br.9-10; *see also* Crow Tribe Cert. *Amicus* Br.20. In sum, all relevant canons of Indian treaty jurisprudence point to a single conclusion: Wyoming's admission to the Union did not abrogate the Tribe's treaty hunting right.

2. "With no direct support for [the] argument" that Wyoming's statehood abrogated the treaty hunting right, *Mille Lacs*, 526 U.S. at 203, the Wyoming District Court adopted the reasoning from the *Repsis* case, which in turn relied exclusively on this Court's 1896 decision in *Ward v. Race Horse* to hold that Wyoming's statehood abrogated the right. As this Court has understood *Race Horse*, however, that decision does not support the atextual and ahistorical proposition that Wyoming's admission to the Union abrogated the Crow's 1868 Treaty right.

In *Race Horse*, this Court examined a provision of an 1869 treaty between the Bannock Tribe and the United States, which reserved for that tribe "the right

to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts," 163 U.S. at 507—*i.e.*, a provision worded almost identically to Article IV of the Crow Tribe's 1868 Treaty. This Court held that the hunting right did not survive Wyoming's admission to the Union. *See Mille Lacs*, 526 U.S. at 206.

The "first part of the holding" in *Race Horse*, *id.* at 203, relied on the "equal footing doctrine," the principle that new states "are endowed with powers and attributes equal in scope to those enjoyed by the states already admitted," *Race Horse*, 163 U.S. at 514-15. One of those "powers," *Race Horse* explained, is the power "to regulate the killing of game within their borders." *Id.* at 514. In the *Race Horse* Court's view, the Bannock's hunting right stood in "irreconcilable" conflict with Wyoming's inherent authority to regulate game. *Id.* Therefore, the Court held, the Bannock's hunting right had been impliedly "repeal[ed]" by Wyoming's subsequent statehood. *Id.*

In the second "part of the holding" in *Race Horse*, *Mille Lacs*, 526 U.S. at 206, the Court concluded that Wyoming's admission to the Union impliedly repealed the treaty right because that right was not intended to exist beyond Wyoming's statehood, *see Race Horse*, 163 U.S. at 515-16. The Court reached that determination by describing the hunting right at issue as "temporary and precarious," rather than "perpetual." *See id.* at 510 (noting the "temporary and precarious nature of the right"); *id.* at 515 (stating that "the privilege given was temporary and precarious").

In 1999, this Court in *Mille Lacs* thoroughly repudiated *Race Horse*'s reasoning. The Mille Lacs Band of Chippewa Indians and several of its members had brought suit against the state of Minnesota seeking a declaration that they retained hunting rights under an 1837 treaty between several Chippewa Bands of Indians and the United States. 526 U.S. at 185. That treaty preserved for the Chippewa the "privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" by those Indians to the United States. *Id.* at 177. Relying on *Race Horse*, Minnesota contended that its admission to the Union in 1858 terminated those Indian treaty rights. *Id.* at 202-03.

The Court resoundingly rejected that argument, declaring that "statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." *Id.* at 205. More broadly, the Court held, Indian "[t]reaty rights are not impliedly terminated upon statehood." *Id.* at 207.

Turning to *Race Horse*'s first line of reasoning, the Court explained that *Race Horse*'s invocation of the "equal footing doctrine" relied on the "false premise" that treaty-protected hunting rights "conflict[] irreconcilably with state regulation of natural resources." *Id.* at 204. On the contrary, the Court explained, those two interests are entirely "reconcilable": States may regulate treaty-protected hunters, but only when doing so is necessary as a "conservation" measure. *Id.* at 204-05 (citing *Fishing*

Vessel and *Antoine v. Washington*, 420 U.S. 194, 207-08 (1975)).

The Court next rejected *Race Horse*'s additional rationale that the "temporary and precarious" hunting right was "not intended to survive statehood." The Court held that "the 'temporary and precarious' language in *Race Horse* is too broad to be useful in distinguishing rights that survive statehood from those that do not." *Id.* at 206. As the Court observed, "any right created by operation of federal law could be described as 'temporary and precarious,' because Congress could eliminate the right whenever it wished." *Id.* at 207. In short, "the line suggested by *Race Horse* is simply too broad to be useful as a guide to whether treaty rights were intended to survive statehood." *Id.*

Instead, the Court explained, the "focus" must be on those conditions or events that Congress intended to serve as "termination point[s]" abrogating treaty rights. *Id.* That inquiry in turn requires examining what the "[t]reaty itself defines" as "the circumstances under which the rights would terminate." *Id.* For example, the Court observed, the treaty provision in *Race Horse* "contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States; the happening of these conditions was 'clearly contemplated' when the Treaty was ratified." *Id.* (quoting *Race Horse*, 163 U.S. at 509).

The Court did not suggest that the treaty in *Race Horse* identified Wyoming's statehood as an event of abrogation. Quite the contrary: The Court admonished that "there is nothing inherent in the

nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood." *Id.* The Court further explained that *Race Horse*'s "decision to the contrary"—*viz.*, that the treaty rights in that case "were impliedly repealed by Wyoming's statehood"—was "informed by" that decision's erroneous belief "that Indian treaty rights were inconsistent with state sovereignty over natural resources and thus that Congress ... could not have intended the rights to survive statehood." *Id.* at 207-08.

The principal *Mille Lacs* dissent repeatedly asserted that the majority had "effectively overrule[d] *Race Horse sub silentio*." *Id.* at 219 (Rehnquist, C.J., dissenting); *see also id.* at 220. Courts and commentators have overwhelmingly agreed with this assessment. *See, e.g.*, *State v. Buchanan*, 978 P.2d 1070, 1083 (Wash. 1999) (en banc) ("[T]he United States Supreme Court effectively overruled *Race Horse* in *Minnesota v. Mille Lacs*."); Robert T. Anderson, *Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather After ANCSA*, 33 Alaska L. Rev. 187, 203 n.111 (2016) (deeming *Race Horse* "now discredited"); Hon. William C. Canby, Jr., *American Indian Law in a Nutshell* 524 (6th ed. 2014) (observing that *Mille Lacs* "squarely rejects" *Race Horse*); Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 Idaho L. Rev. 475, 551 n.473 (2005) (noting that "*Race Horse* and its progeny have been effectively abrogated" by *Mille Lacs*). In the nineteen years since *Mille Lacs*, this Court has never again cited *Race Horse*.

3. In light of *Mille Lacs*, the "effectively overrule[d]" and "discredited" *Race Horse* decision does not support the proposition that Wyoming's admission to the Union abrogated the Crow's treaty right. Because neither the 1868 Treaty nor the Statehood Act—nor any other act of Congress—provides or even suggests that Wyoming's admission to the Union would or did abrogate the treaty right, the only conceivable way that Wyoming's statehood could have repealed the Tribe's hunting right is by implication, which *Mille Lacs* conclusively rejects. *See* 526 U.S. at 207 (holding that "reserved treaty rights" cannot "be extinguished by *implication* at statehood"). Moreover, after repudiating the "temporary and precarious" framework for characterizing treaty rights, the Court made clear that the proper focus should be on whether specific treaty language "define[d] the circumstances under which the rights should terminate." *Id.* And while the *Race Horse* treaty did contain express language terminating a hunting right upon the occurrence of certain specified events—as the Court in *Mille Lacs* noted, *see id.*—the fact is that Wyoming's statehood was not one of those events. The same thing is true with respect to the materially identical treaty at issue here: Nothing in the 1868 Treaty provides that Wyoming's statehood would bring the Tribe's hunting right to an end.

The Wyoming District Court provided no other rationale for concluding that Wyoming's admission to the Union abrogated the Crow's treaty hunting right. Its decision relied exclusively on *Repsis*, which relied exclusively on *Race Horse* as "conclusively establish[ing]" that the hunting right preserved in the 1868 Treaty was a "temporary right" that was

"repealed with Wyoming's admission into the Union." 73 F.3d at 994; *see also id.* at 992 (holding that "[t]he Tribe's right to hunt reserved in the [1868 Treaty] was repealed by the act admitting Wyoming into the Union"). *Mille Lacs* rejects that reasoning across the board, from the proposition that statehood abrogates treaty-based hunting rights under the "equal footing doctrine," to the notion that "temporary and precarious" treaty rights that terminate upon *certain* explicitly identified events *ipso facto* also impliedly terminate upon a state's admission to the Union. Because Wyoming's statehood is not one of the rights-terminating events specifically enumerated in the 1868 Treaty, and because no other congressional act, including the Statehood Act, provides that Wyoming's statehood would terminate Indian treaty rights, Wyoming's admission to the Union did not abrogate the Crow Tribe's hunting right.

B. The Establishment of the Bighorn National Forest Did Not Abrogate the Crow Tribe's Treaty Right.

The Wyoming District Court provided just one other basis for categorically abrogating the Tribe's treaty right to hunt in the Bighorn National Forest: That vast swath of land—which all agree constituted "unoccupied lands of the United States" when the 1868 Treaty was ratified—became "occupied" merely upon being declared a national forest in 1897. Pet.App.21-22. In so holding, the court relied solely on the Tenth Circuit's decision in *Repsis*, which observed that because the land comprising the Bighorn National Forest was "no longer available for settlement," the establishment of the forest "resulted in the

'occupation' of the land." 73 F.3d at 993. That reasoning "sounds absurd, because it is." *Sekhar v. United States*, 570 U.S. 729, 738 (2013). The text of the 1868 Treaty, the historical record, and the practical construction adopted by the parties all confirm what common sense already suggests: The mere creation of the Bighorn National Forest, through a proclamation that expressly prohibited "all persons" from making "entry or settlement" on that land, did not suddenly render that land "occupied" and terminate the Crow's treaty hunting right.

1. The 1868 Treaty does not define "occupied" or "unoccupied," but its text indicates that both parties would have understood the term "occupied" as akin to physical settlement. The Treaty repeatedly links the notions of "occupation" and "settlement." For example, it provides that the Crow Reservation would be established for the "occupation of" Tribe members, and that all others generally could not "settle upon" that land. Art. II, 15 Stat. at 650. On the new land they would be "occup[ying]," Tribe members would be "settlers"; every member over the age of four who "settled permanently upon said reservation" would receive rations "for the period of four years after he shall have settled upon said reservation." Art. VI ¶4, IX ¶6, 15 Stat. at 651-52. And, of course, in exchange for agreeing to "make no permanent settlement elsewhere," the Crow retained the right to hunt "on the unoccupied lands of the United States," Art. IV, 15 Stat. at 650, a provision that indicates that "occupied" lands would be those where others eventually made their "settlement." Particularly for Indians with limited to no command of the English language—much less legal terms of art—these passages strongly

suggest that for purposes of the 1868 Treaty, the term "occupied" was considered synonymous with "settled," and "unoccupied lands" meant lands that were not settled. *See Fishing Vessel*, 443 U.S. at 676.

Other textual clues demonstrate that "unoccupied lands" meant lands that were not just unsettled, but unsettled by non-Indians. Article IV provides that the Crow's right to hunt on "the unoccupied lands of the United States" would last "as long as peace subsists among the whites and Indians on the borders of the hunting districts." Art. IV, 15 Stat. at 650. It is undisputed that the "hunting districts" comprised the land ceded by the Crow. *See* JA234. Article IV thus indicates that the "hunting districts" encompassed off-reservation lands where "the whites" had not settled, for "the whites" were located on the opposite side of "the borders of the hunting districts," *i.e.*, the ceded land. If "the whites" eventually settled within the borders of the hunting districts, those tracts of land would become "occupied," but while the districts remained unsettled by "the whites," the land would remain "unoccupied lands."

Negotiations preceding the 1868 Treaty underscore that "occupied" lands meant lands physically settled by non-Indians. *See Choctaw*, 318 U.S. at 432. During his November 1867 discussions with Crow tribal leaders, Commissioner Taylor explained that "the white people are rapidly increasing and ... occupying all the valuable lands." *Proceedings* 86. A Crow leader, Black Foot, agreed that "[w]e are being surrounded by the whites." *Id.* at 88. Indeed, the physical "occupation" of Crow territory was a principal reason why the federal government

advocated the establishment of a Crow Reservation in the first place: On that land, the federal government could better ensure that "the white man" would not "trespass." *Id.* at 86. Thus, the parties to the 1868 Treaty employed an understanding of the term "occupied" that connoted the actual, physical presence of non-Indian settlers.

The post-1868 historical record lends further support to that understanding. In 1869, during consideration of an appropriations bill fulfilling the United States' obligations under the 1868 Treaty, Senator Harlan (a former Secretary of the Interior, which housed the Office of Indian Affairs) explained that the 1868 Treaty permitted the Crow "to hunt, so long as they can do so without interfering with the settlements." Cong. Globe, 40th Cong., 3d Sess. 1348 (1869). "So long as outside lands, outside of the reservation, may not be occupied by settlements, and may be occupied by game," Senator Harlan continued, the Crow "may hunt the game." *Id.* In 1873, Felix Brunot—the Chairman of the Board of Indian Commissioners—echoed that interpretation during negotiations to purchase additional land from the Tribe. As Brunot explained to the Tribe, under "article fourth" of the 1868 Treaty, "the Crows" retained the right to hunt game "where there are not too many whites." U.S. Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1873* 135 (1874). He continued, "[t]he treaty says ... as long as the white men are not here ... with farms, [the Crow] may go there and hunt." *Id.* at 132.

Finally, while Indian interpretive canons caution against giving treaty language an "artificial meaning" that "might be given to it by the law and by lawyers," *Seufert Bros.*, 249 U.S. at 199, contemporaneous dictionaries defined the term "occupy" in a manner consistent with the historical record. One legal dictionary, for example, explained that the term "occupy" "[i]mplies actual use" or "cultivation by a particular person," and that the term "settle" means "to occupy ... land." William C. Anderson, *A Dictionary of Law* 725, 944 (1889). Another explained that "[s]ettlers and occupants, within the meaning of [a public land use law] ... , are those who resided personally on the public land in question, or who occupy and use it." 2 Benjamin Vaughan Abbott, *Dictionary of Terms and Phrases Used in American or English Jurisprudence* 197-98 (1879). Those definitions mirror the modern-day distinction between "occupied" and "unoccupied." *See, e.g.*, *American Heritage Dictionary of the English Language* 1956 (1992) (defining "occupy" as "to dwell or reside in" and defining "unoccupied" as "not inhabited").

2. The foregoing evidence confirms the common-sense point that the mere establishment of the Bighorn National Forest in 1897 did not render that vast land "occupied" so as to abrogate the Crow Tribe's treaty hunting right. The Crow and the United States considered "occupied" to be synonymous with physical settlement, particularly by non-Indians. President Cleveland's proclamation creating the Bighorn National Forest did not suddenly result in that entire land being populated by non-Indian settlers. Quite the contrary: The proclamation expressly "reserved from entry or settlement" the land comprising the

forest, and it warned "all persons not to enter or make settlement upon" the land. Proclamation No. 30, 29 Stat. at 909-10. By barring "entry or settlement" on the reserved land, the proclamation accomplished just the opposite of "occupation," both as a matter of ordinary English and as the parties to the 1868 Treaty understood that term. Indeed, it is difficult to imagine how the proclamation could have rendered the land any more *unoccupied* than by prohibiting anyone from "enter[ing] or mak[ing] settlement upon" it.

In holding otherwise, the Wyoming District Court relied solely on the Tenth Circuit's *Repsis* decision, which observed that the mere creation of the Bighorn National Forest rendered the land "occupied." 73 F.3d at 993. That perplexing conclusion, however, was the product of a host of errors, of both omission and commission.

As an initial matter, the *Repsis* court did not even attempt to discern what "unoccupied lands" meant to the parties to the 1868 Treaty, particularly the Crow. The court engaged in no examination of the Treaty's text, its negotiations, or its history; in fact, it engaged in no treaty interpretation at all, much less interpretation consistent with the Indian canons of construction. As a result, the court failed to recognize that the treaty parties understood "unoccupied lands" essentially to mean those that non-Indians had not physically settled.

Furthermore, the court acknowledged that, in 1868, the land later comprising the Bighorn National Forest was "unoccupied" and "open for settlement." *Id.* It then reasoned that once the land was "no longer available for settlement," it became "occupied." But as

a matter of logic, land that is "unoccupied" does not become "occupied" by a *prohibition* on settlement. And as a matter of the historical record, the parties to the 1868 Treaty understood the event that would terminate the Tribe's hunting rights, *Mille Lacs*, 526 U.S. at 207, to be actual, physical settlement of the Tribe's aboriginal hunting grounds—not a sort of metaphysical "occupation" by non-settlement.

Emblematic of—and likely contributing to—its cursory and haphazard legal analysis, the Tenth Circuit also got key facts wrong, stating that "Congress created" the Bighorn National Forest "in 1887." *Repsis*, 73 F.3d at 993; *see also id.* at 994 (reiterating that the forest was created "in 1887"). In fact, in *1891*, Congress enacted the Forest Reserve Act, which gave the *President* the power to create forest reserves. Pursuant to that statute, in *1897*, President Cleveland (not Congress) created the Bighorn National Forest. Additionally, in asserting that the forest's creation rendered the land "occupied," the court cited federal law enacted three months *after* its creation. *Id.* at 993 (citing Act of June 4, 1897, 30 Stat. 11, 35-36).

Quite apart from the fact that the parties to the 1868 Treaty would not have understood the mere creation of a national forest to render the hunting ground "occupied," the proclamation establishing the Bighorn National Forest could not, as a matter of law, have abrogated the Tribe's hunting right. President Cleveland's "power, if any, to issue" the proclamation must have stemmed "either from an act of Congress or from the Constitution itself." *Mille Lacs*, 526 U.S. at 188-89. When President Cleveland established the

Bighorn National Forest, he did so pursuant to the Forest Reserve Act. *See* Proclamation No. 30, 29 Stat. at 909. In that statute, Congress gave the President authority to "set apart and reserve" any "public land[s] bearing forests." Forest Reserve Act, §24, 26 Stat. at 1103. But Congress also made crystal clear that "nothing in this act shall change, repeal, or modify any ... treaties made with any Indian tribes." *Id.* §10, 26 Stat. at 1099. Congress thus explicitly *barred* the President from abrogating Indian treaty rights when creating national forests pursuant to the Forest Reserve Act. So even if President Cleveland had intended to render the Crow Tribe's hunting grounds "occupied" via his proclamation—*sub silentio*—he lacked the legal authority to do so. *See Swim v. Bergland*, 696 F.2d 712, 717 (9th Cir. 1983) ("reject[ing]" argument that Forest Reserve Act gave the President "the power to *extinguish* Indian treaty rights"); *cf. Mille Lacs*, 526 U.S. at 189-90 (concluding that 1830 Removal Act did not authorize presidential order terminating Chippewa hunting rights).

But there is no need to ascribe such motives to President Cleveland. Prohibiting "entry or settlement" on land simply does not cause that land to become "occupied." And there is no evidence that the Crow Tribe or the United States—or anyone—thought otherwise when the 1868 Treaty was ratified or when the Bighorn National Forest was established.

To be sure, none of this means the federal government is barred from administering specific tracts of lands in the Bighorn National Forest in such a manner that the Crow signatories to the 1868 Treaty would have understood to render those lands

"occupied." But this case does not involve a claim that specific parts of the forest are "occupied," much less in a manner within the meaning of the 1868 Treaty. In particular, Wyoming's claim is not that the small area of the forest that Petitioner entered comprises "occupied lands" but other portions of the forest do not. Rather, Wyoming's claim—which the decision below accepted—is that the mere ***establishment*** of the Bighorn National Forest immediately rendered the *entire* 1.1-million-acre forest "occupied." Nothing in law or logic supports that sweeping conclusion.

Finally, neither party to the 1868 Treaty considers the Bighorn National Forest's creation to have abrogated the hunting right. The United States has never suggested that the mere legal act of creating a national forest "occupies" land or otherwise extinguishes Indian treaty rights there. Just the opposite: The U.S. Forest Service expressly recognizes that "[m]any" Indian treaties contain "off-reservation treaty rights," including "rights to hunt," and that these rights may be exercised on "ceded lands that are within the boundaries of present day National Forest System lands." U.S. Forest Serv., U.S. Dep't of Agric., *Forest Service Manual* §1563.8b(1) (2016). And in this very case, the United States has agreed with the Crow Tribe that "the creation of the Bighorn National Forest, in and of itself, did not render those lands occupied." U.S. Cert. *Amicus* Br.12; *accord* Crow Tribe Cert. *Amicus* Br.22-23. As with Wyoming's admission to the Union, therefore, the "practical construction" that the 1868 Treaty's parties have given to that agreement confirms that the establishment of the Bighorn National Forest did not abrogate the Crow's treaty right. *Choctaw*, 318 U.S. at 432.

C. Affirming the Decision Below Would Have Far-Reaching Consequences.

If this Court were to hold that Wyoming's admission to the Union or the creation of the Bighorn National Forest abrogated the hunting right reserved in the 1868 Treaty, the implications would be dramatic. For well over a century, Crow members like Petitioner understood the 1868 Treaty to reserve an off-reservation hunting right, including the right to hunt on unoccupied federal land in northern Wyoming. That hunting right not only embodies a promise repeatedly made to the Tribe by the United States; it ensures that the Tribe's members may maintain a traditional practice of subsistence hunting that is foundational to their identity and well-being. Indeed, the lands comprising the Bighorn National Forest constitute the Tribe's "sacred hunting grounds according to Crow oral tradition." Timothy P. McCleary et al. Cert. *Amici* Br.10-11. Consequently, affirming the decision below would do far more than simply strip the Tribe of a treaty-guaranteed right—though that harm alone would itself be an affront to the dignity of a sovereign people whose peaceful relationship with the United States dates back some 200 years, *see* n.1, *supra*, and who have endured more than their fair share of broken promises, *see* p.6 & n.3, *supra* (describing failings of 1851 Treaty). It would also eliminate a hunting tradition of immense practical and spiritual significance.

But the problems with affirmance run deeper still. No fewer than nineteen other Indian tribes, in their own treaties with the United States, have also preserved off-reservation hunting or usufructuary

rights using language identical or materially identical to the language in the 1868 Treaty—*i.e.*, on "unoccupied lands," "open and unclaimed lands," or "unclaimed lands":

- Treaty with the Eastern Band of Shoshonees and the Bannack Tribe of Indians, art. IV, July 3, 1868, 15 Stat. 673, 674-75 (preserving "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts");
- Treaty with the Navajo Tribe of Indians, art. IX, Aug. 12, 1868, 15 Stat. 667, 670 (preserving "the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase");
- Treaty with the Nez Perce Indians, art. III, June 11, 1855, 12 Stat. 957, 958 (preserving "the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land"); *see also* Treaty with the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, art. III, July 16, 1855, 12 Stat. 975, 976 (same); Treaty with the Yakama Nation of Indians, art. III, June 9, 1855, 12 Stat. 951, 953 (same);
- Treaty with the Qui-nai-elt and Quil-leh-ute Indians, art. III, Jan. 25, 1856, 12 Stat. 971, 972 (preserving "the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands"); *see also* Treaty with Nisqualli, Puyallup, etc., art. III, Dec. 26, 1854, 10 Stat. 1132, 1133 (same);

- Treaty with the Makah Tribe of Indians, art. IV, Jan. 31, 1855, 12 Stat. 939, 940 (preserving "the privilege of hunting and gathering roots and berries on open and unclaimed lands"); *see also* Treaty with the S'Klallam Indians, art. IV, Jan. 26, 1855, 12 Stat. 933, 934 (same); Treaty with the Dwamish, Suquamish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, art. V, Jan. 22, 1855, 12 Stat. 927, 928 (same).
- Treaty with the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, art. I, June 9, 1855, 12 Stat. 945, 946 (preserving "the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens");

Many of these tribes live on Indian reservations adjacent to national forests formed from ceded lands.[12] Accordingly, a decision holding that federal lands become "occupied" simply upon designation as a national forest would cast doubt upon the validity of federal treaty rights upon which numerous other Indian tribes have relied for generations.[13]

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[12] For example, the Navajo Reservation borders the Coconino National Forest, and the Yakama Reservation borders the Gifford Pinchot National Forest.

[13] Those reliance interests are bolstered by the fact that every court to have addressed the issue—except the Tenth Circuit in *Repsis* and the decision below—has concluded that national forests are "unoccupied" or "open and unclaimed" lands. *See State v. Miller*, 689 P.2d 81, 82 n.2 (Wash. 1984); *State v. Stasso*, 563 P.2d 562, 565 (Mont. 1977); *State v. Tinno*, 497 P.2d 1386,

A decision holding that a state's admission to the Union can impliedly abrogate reserved treaty rights—despite no such suggestion in the treaty or the statehood act—would have an even more extraordinary impact. Like the 1868 Treaty, the treaties described above (and many others) do not enumerate statehood as a rights-terminating event. And like the Wyoming Statehood Act, the statehood acts of numerous Western states do not contain language abrogating Indian treaty rights. Accordingly, if Wyoming's admission to the Union abrogated the Crow's reserved hunting right in the 1868 Treaty, there is no principled reason why other states' admissions should not also have abrogated reserved rights in those numerous other treaties—including rights this Court has addressed in previous cases without so much as hinting that they no longer exist. *See, e.g.*, *Fishing Vessel*, 443 U.S. at 661-62.

These far-reaching consequences stand in stark contrast to the minimal burden on Wyoming if this Court reverses the decision below. Wyoming would not lose its authority to regulate hunting within its borders, including within the Bighorn National Forest. Indeed, it would remain able to enforce its hunting regulations against Crow members—including Petitioner—so long as it can prove that those regulations as applied to the Crow satisfy the

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1391 (Idaho 1972); *Confederated Tribes of the Umatilla Indian Reservation v. Maison*, 262 F. Supp. 871, 873 (D. Or. 1966), *aff'd*, 382 F.2d 1013 (9th Cir. 1967); *State v. Arthur*, 261 P.2d 135, 141 (Idaho 1953). Put differently, not one other decision has held that the establishment of a national forest abrogates Indian treaty rights.

"'conservation necessity' standard" and other applicable standards articulated by this Court. *Mille Lacs*, 526 U.S. at 204-05; *see, e.g.*, *Antoine*, 420 U.S. at 207; *Wash. Game Dep't v. Puyallup Tribe*, 414 U.S. 44, 48-49 (1973).[14]

Finally, the significant impact on the Crow Tribe and Native Americans more generally of an affirmance—and the marginal impact on Wyoming of a reversal—should not obscure that upholding the decision below will directly affect whether Petitioner will be able to provide for himself and his family. Not only did Petitioner's sentence suspend his hunting privileges in Wyoming for three years and impose a one-year suspended jail sentence; the decision below forever strips Petitioner of his federally enshrined right to hunt in the Bighorn National Forest. Pet.App.9. As this case makes clear, the extent to which Petitioner can put food on his table during unforgiving Big Sky winters depends in great part on his ability to exercise the off-reservation hunting right reserved in the 1868 Treaty. *See, e.g.*, JA192, 197, 208-09. Instead of upholding that right, however, the court below upheld Petitioner's criminal conviction and sentence, all based on reasoning that does not comport with precedent, canons of construction, historical evidence, the shared understanding of the treaty parties, or common sense. This Court should not tolerate that result.

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[14] As noted, whether Wyoming satisfies these standards is not before this Court. *See* n.10, *supra*.

II. Issue Preclusion Does Not Bar Petitioner From Addressing The Treaty Right's Validity.

In addition to ruling on the merits, the Wyoming District Court concluded that issue preclusion "should apply to preclude Herrera from attempting to relitigate the validity of the off-reservation treaty hunting right" that was "previously held to be invalid" in the *Repsis* case. Pet.App.14, 31. The state apparently considered this subject such a non-starter that it did not raise it at any point during Petitioner's criminal proceedings, addressing it only after the court below *sua sponte* requested supplemental briefing on it. Pet.App.10-11. The court, moreover, proceeded to address the merits regardless. That shared reluctance to rely on issue preclusion was well-advised, as the doctrine, for several reasons, does not apply here.

A. The *Repsis* Courts' Determination that Wyoming's Statehood Abrogated the Treaty Right Is Not Entitled to Preclusive Effect.

Issue preclusion "generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001); *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Federal law governs the preclusive effects of a "federal-court judgment" in a "federal-question case[]." *Taylor*, 553 U.S. at 891.

Under well-established federal law, a prior judgment lacks preclusive effect when there has been

an intervening "'change in the applicable legal context.'" *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (quoting Restatement (Second) of Judgments §28 cmt. *c* (1980)) (brackets omitted); *see also Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362 (1984); *Montana v. United States*, 440 U.S. 147, 161 (1979). After all, "a change or development in the controlling legal principles may make that [prior] determination obsolete or erroneous," and issue preclusion "is not meant to create vested rights in decisions that have become obsolete or erroneous with time." *Comm'r v. Sunnen*, 333 U.S. 591, 599 (1948).

That principle forecloses any attempt to treat the decisions in *Repsis* as binding insofar as they held that the Crow's treaty right was abrogated by Wyoming's admission to the Union. In making that determination, both the federal district court and the Tenth Circuit relied exclusively on *Race Horse*, concluding (in the words of the district court) that the Wyoming Statehood Act "abrogated the treaty-based hunting right" under "the Equal Footing Doctrine," and that the Crow Tribe's "'temporary and precarious'" hunting right "ceased when the land ... came within the authority and jurisdiction of [the] newly-created state [of Wyoming]." 866 F. Supp. at 522-23; *see also* 73 F.3d at 992, 994 (affirming district court on these grounds). Indeed, for good measure, the Tenth Circuit declared *Race Horse* to be "compelling, well-reasoned, and persuasive." 73 F.3d at 994.

There was unquestionably a "change in the applicable legal context" following the *Repsis* decisions. In *Mille Lacs*, this Court firmly held that

the "equal footing doctrine" applied by *Race Horse* did not justify abrogating Indian treaty rights. *See* Pet.App.21. But this Court did not stop there. Having dispensed with the "equal footing doctrine" in this context, the Court went on to specify that "[t]reaty rights are not impliedly terminated upon statehood"; that *Race Horse*'s "temporary and precarious" language was "too broad to be useful in distinguishing rights that survive statehood from those that do not"; and that courts should instead look to the treaty language itself to determine the specific conditions under which treaty rights expire. 526 U.S. at 205-07; *see* pp.28-30, *supra*. As noted, nearly every observer—including the principal *Mille Lacs* dissent, without objection by the majority—has concluded that *Mille Lacs* "effectively overruled" *Race Horse*. *See* p.30, *supra*. But at a minimum, *Mille Lacs* quite obviously constituted "a change or development in the controlling legal principles" concerning Indian treaty rights, *Sunnen*, 333 U.S. at 599, thus defeating any preclusion based on the ground that Wyoming's admission to the Union brought an end to the "validity of the [Crow's] off-reservation treaty hunting right," Pet.App.13; *see also* 18 Wright & Miller, *Federal Practice & Procedure* §4425 (3d ed.) (noting that "Supreme Court clarification of issues that had been debated or uncertain in the lower courts is ... a proper justification for avoiding preclusion").

B. The Tenth Circuit's Alternative Determination in *Repsis* that Creation of the Bighorn National Forest Rendered the Ceded Lands "Occupied" Is Not Entitled to Preclusive Effect.

In its brief opposing certiorari, Wyoming argued that the Tenth Circuit's self-styled "alternative basis for affirmance" in *Repsis*—that the creation of the Bighorn National Forest rendered it "occupied"—is separately entitled to preclusive effect. Br. in Opp. 17-18; *see* 73 F.3d at 993. At the outset, it bears noting that the Wyoming District Court did not base its issue preclusion ruling on that ground, which is hardly surprising given that the state made no such argument before it.[15] Instead, Wyoming asserted that the "issue" for issue preclusion purposes was "the continued validity of the off-reservation treaty hunting right," not the subsidiary question of whether the forest was "occupied" upon its creation. Pet.App.13. If that is the "issue," of course, then Wyoming's effort to invoke preclusion necessarily fails because, contrary to the state's position below, *Mille Lacs* unquestionably changed the relevant law regarding interpretation of Indian treaty rights. *See* pp.28-30, 47-48, *supra*. But even taking at face value Wyoming's belated effort to fashion another basis for preclusion, the state is incorrect for several independent reasons.

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[15] Indeed, in examining issue preclusion, the Wyoming District Court did not even look to the Tenth Circuit's decision, much less that court's "occupation" determination. *See* Pet.App.14 (identifying the "federal district court['s]" adjudication of the Treaty's validity as "necessary to that judgment").

First, the state's reliance on the Tenth Circuit's alternative determination about the establishment of the Bighorn National Forest runs headlong into another exception to issue preclusion. The Restatement (Second) of Judgments, which this Court routinely consults on issue-preclusion questions, *see Bravo-Fernandez v. United States*, 137 S. Ct. 352, 357-58 (2016); *Taylor*, 553 U.S. at 894-95; *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-02 (2001); *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 172 (1984), provides: "If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is *not* conclusive with respect to *either* issue." Restatement §27 cmt. *i* (emphases added). Because the Tenth Circuit in *Repsis* functioned as a "court of first instance" when opining on the meaning of "unoccupied lands"—a question that the *Repsis* district court had not addressed—its self-styled "alternative" conclusion that the Bighorn National Forest was occupied upon creation should not be given preclusive effect.[16]

This case amply demonstrates the wisdom of the Restatement's rule. As the Restatement explains, "a determination in the alternative may not have been as carefully or rigorously considered as it would have if it had been necessary to the result." *Id.* That perfectly

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[16] Relatedly, because the Tenth Circuit had already *affirmed* the district court's conclusion that Wyoming's statehood abrogated the Crow Tribe's hunting right, its determination regarding "occupied lands" does not enjoy preclusive effect because that issue was not "necessary" or "essential" to its "final outcome." *Bobby*, 556 U.S. at 835.

describes the Tenth Circuit's passing "alternative" determination regarding the "occupied" issue, which was riddled with legal, factual, and logical errors. *See* pp.37-38, *supra*; *Bravo-Fernandez*, 137 S. Ct. at 358 (disapproving issue preclusion "[w]here circumstances suggest that an issue was resolved on erroneous considerations" (citing Restatement §29)). The Tenth Circuit's decision, moreover, was not subject to plenary appellate review, further undermining the "underlying confidence that the result achieved" in that decision "was substantially correct"—a "premise" of preclusion doctrine. *Bravo-Fernandez*, 137 S. Ct. at 358; *cf. Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 647 (2006).[17] And that confidence in a correct result is also "unwarranted" where the "determination relied on as preclusive" is "itself inconsistent with another determination of the same issue." Restatement §29. Here, the Tenth Circuit's inventive determination that the mere establishment of a national forest results in the abrogation of Indian treaty rights is inconsistent with the decisions of numerous other courts. *See* n.13, *supra*.

Second, the Tenth Circuit's determination also is not preclusive because the Crow Tribe lacked a full and fair opportunity to litigate the question of whether the establishment of the Bighorn National Forest rendered that land "occupied." As this Court has

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[17] Because appellate review increases the likelihood of a correct result, the Restatement provides that if an appellate court upholds both independently sufficient determinations, a lower judgment *is* conclusive as to both determinations. Restatement §27 cmt. *o*. But that did not occur with respect to the Tenth Circuit's decision in *Repsis*.

"repeatedly recognized," issue preclusion "cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Allen v. McCurry*, 449 U.S. 90, 95 (1980); *see also, e.g.*, *Taylor*, 553 U.S. at 892. This requirement "is a most significant safeguard." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 328 (1979); *see also Hurd v. District of Columbia*, 864 F.3d 671, 680 (D.C. Cir. 2017) (noting the "general view of courts and commentators" that the "full and fair opportunity" requirement is "among the most critical guarantees of fairness" in applying issue preclusion).

That principle readily applies here. In the proceedings before the *Repsis* district court, the state offered no argument at all that the creation of the Bighorn National Forest resulted in its "occupation." Instead, it argued (in all of two pages) that congressional acts over the past century gradually rendered the forest now "occupied." *See* Summ. J. Br. 6-7, *Repsis*, No. 92-cv-1002 (D. Wyo. Nov. 16, 1992) (contending that "there no longer remains unoccupied lands of the United States"); Reply Br. 7-8, *Repsis*, No. 92-cv-1002 (D. Wyo. Dec. 18, 1992). Given that cursory and off-point analysis, it is hardly surprising that the district court in *Repsis* did not pass on the "occupied" question at all. *See* pp.11-12, 50, *supra*.

Against this background, the Crow's opening brief in the Tenth Circuit focused, naturally enough, solely on the issue that the district court had actually decided: that the Tribe's treaty right ended upon Wyoming's admission to the Union. In its response brief, however, the state suddenly argued—for the

first time in the litigation—that the forest's mere creation rendered it "occupied." *See* Br. for Appellees 21, *Repsis*, No. 94-8097 (10th Cir. Apr. 12, 1995) (asserting that "[t]he public lands that now comprise the Big Horn National Forest have been 'occupied' since its creation in 1887 [*sic*]"). That bolt from the blue left the Tribe with very little opportunity to address the contention. In its remaining reply brief, the Tribe necessarily had to devote the bulk of its limited pages to the issue decided against it by the district court—the same issue to which the state had devoted most of its response brief—leaving little room to address the state's newly raised alternative argument regarding the effect of the national forest's establishment.

That exceedingly narrow window of opportunity—highly limited reply briefing at the appellate level—falls well short of the "full and fair opportunity to litigate" an issue necessary for preclusion to attach. To explore the issue properly, the Tribe needed, at the very least, a meaningful chance to explain in detail why no party to the 1868 Treaty would have understood that the mere creation of a national forest would terminate the hunting right. *See* pp.33-35, *supra*. Or to show how neither the post-1868 historical record nor the parties' ongoing practical construction of the Treaty supports that proposition. *See* pp.35-36, 40, *supra*. Or to demonstrate that nothing in President Cleveland's proclamation operated to extinguish Indian hunting rights—nor could it have, given the anti-abrogation language in the Forest Reserve Act. *See* pp.38-39, *supra*. But after having had no reason to advance these arguments in the district court (where the state never contended

that the forest's creation constituted "occupation"), the Tribe was afforded no "full and fair" opportunity to press them in limited reply briefing before the Tenth Circuit.[18] And the only remaining avenue to contest the issue—a petition for certiorari seeking discretionary review of a decision resting on multiple grounds—hardly filled the gap.

In short, it would stack one injustice upon another if application of the doctrine of issue preclusion now denied Petitioner the opportunity to address an issue that the Tribe never had a meaningful opportunity to address in the first place. The Court should thus reject the state's effort to exploit even further a one-sided victory that it did not fairly earn.

C. Applying Issue Preclusion Here Would Needlessly Implicate Unsettled Constitutional Questions.

Not only does declining to apply issue preclusion here fit comfortably within this Court's precedents; applying preclusion would require this Court to create new law that is both far-reaching and fraught with constitutional implications. The Court's "usual practice" of "avoid[ing] the unnecessary resolution of constitutional questions," *N.W. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009), further counsels against applying issue preclusion here.

To begin with, this Court has "often repeated the general rule that 'one is not bound by a judgment *in*

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[18] The limited briefing on this question in the Tenth Circuit also explains—and provides a further reason not to give preclusive effect to—the Tenth Circuit's erroneous resolution of the question as an alternative ground for its decision.

personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Taylor*, 553 U.S. at 893 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). Because this rule is "grounded in due process," *id.* at 901, and the right of a litigant to have "his own day in court," *Richards v. Jefferson Cty.*, 517 U.S. 793, 798 (1996), the Court has emphasized the "importance of this rule" and accordingly takes a "'constrained approach to nonparty preclusion,'" binding nonparties to prior judgments only in "exceptional" circumstances, *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (quoting *Taylor*, 553 U.S. at 898).

There is no dispute in this case that Petitioner was not a party to the *Repsis* litigation; he was all of ten years old when Mr. Ten Bear and the Crow Tribe filed suit in 1992. The Wyoming District Court nevertheless concluded that Petitioner is "in privity with the Crow Tribe" such that Petitioner could be bound by *Repsis*. Pet.App.17. This Court, however, has never addressed the circumstances under which a member of an Indian tribe can be deemed in "privity" with his or her tribe. That question has wide-ranging practical consequences, but it also implicates the due process concerns that attend nonparty preclusion, as well as questions of tribal sovereign immunity given Wyoming's attempt to invoke preclusion against a party that it claims is no different from a sovereign tribe. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (describing tribal sovereign immunity); *cf. United States v. Mendoza*, 464 U.S. 154, 155 (1984) (holding that nonmutual offensive preclusion does not apply against federal government).

Next, applying preclusion here would require this Court to approve the use of offensive issue preclusion by a state against a criminal defendant—following a prior *civil* judgment, no less. This Court has repeatedly emphasized that issue preclusion, which "first developed" in civil litigation, has even less purchase in criminal cases. *Bravo-Fernandez*, 137 S. Ct. at 358. The Court has called for "guarded application of preclusion doctrine in criminal cases," *id.*, and just last Term, a plurality of this Court declined to "import" "issue preclusion principles in civil cases ... into the criminal law," *Currier v. Virginia*, 138 S. Ct. 2144, 2152 (2018) (plurality op.).

These admonishments, moreover, have come in the context of *defensive* issue preclusion—*i.e.*, a criminal defendant's attempt to preclude the state from invoking an earlier criminal judgment. This Court has taken an even more skeptical view of a state's attempt to employ *offensive* issue preclusion against a criminal defendant. For example, in *Simpson v. Florida*, 403 U.S. 384 (1971) (per curiam), the state court had held that petitioner's conviction at an earlier trial had preclusive effect at a subsequent criminal trial on another charge. *Id.* at 386. This Court dismissed that reasoning as "plainly not tenable." *Id.* And in *Currier*, a plurality expressed concerns that "grafting civil preclusion principles onto the criminal law" could allow "the government to invoke the doctrine to bar criminal defendants from relitigating issues decided against them in a prior trial." 138 S. Ct. at 2155 (plurality op.). Courts of appeals, furthermore, have explicitly rejected offensive issue preclusion in criminal proceedings. *See, e.g.*, *United States v. Gallardo-Mendez*, 150 F.3d

1240, 1246 (10th Cir. 1998); *United States v. Pelullo*, 14 F.3d 881, 889-96 (3d Cir. 1994); *United States v. Harnage*, 976 F.2d 633, 633-36 (11th Cir. 1992). Even more striking, the foregoing skepticism—and outright repudiation—of offensive preclusion in criminal cases arose in cases involving prior *criminal* judgments. This case, by contrast, involves a prior *civil* judgment.

Simply put, this Court has never come close to endorsing the proposition necessary to apply issue preclusion here: that a state may offensively preclude a defendant in a criminal prosecution from asserting his most meaningful defense because an underlying issue was determined several decades earlier in a civil suit in which the criminal defendant never participated. Given the palpable constitutional implications of such a rule, *see, e.g.*, *Gallardo-Mendez*, 150 F.3d at 1245-46, the Court should not—and need not—do so now, particularly after the state here failed to raise issue preclusion in the first place. *Cf. Arizona v. California*, 530 U.S. 392, 410 (2000) (noting that preclusion is "ordinarily lost if not timely raised").

Finally, applying issue preclusion here would not advance the policies underlying the doctrine. Issue preclusion is intended to reduce the "expense and vexation attending multiple lawsuits," "conserv[e] judicial resources," and "minimiz[e] the possibility of inconsistent decisions." *Taylor*, 553 U.S. at 892; *see also Standefer v. United States*, 447 U.S. 10, 21 (1980). But Petitioner has not brought a separate suit triggering "expense and vexation" or taxing "judicial resources"; he was criminally prosecuted by the state. And if this Court declined to address the merits of the decision below, the same "inconsistent decisions" that

presumably led this Court to grant certiorari will remain in place, *see* Pet.24-27; Reply.5-7; U.S. Cert. *Amicus* Br.15-18; n.13, *supra*, requiring further "judicial resources" to sort out the lingering uncertainty. That outcome has nothing to recommend it, further militating against applying issue preclusion.

* * *

The 1868 Treaty guaranteed to the Crow Tribe the continuing right to hunt on the "unoccupied lands of the United States." Neither the 1868 Treaty nor any act of Congress contains any suggestion that Wyoming's admission to the Union would abrogate the hunting right, and the mere creation of the Bighorn National Forest did not render that land "occupied" so as to abrogate the hunting right. The Wyoming District Court's atextual and ahistorical conclusion to the contrary has already produced one unjust criminal conviction and, if upheld, will undermine centuries-old treaty rights enjoyed by numerous other Indian tribes. Reversal is imperative.

CONCLUSION

The Court should reverse the judgment of the Wyoming District Court.

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CLAYVIN HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ Of Certiorari To The District Court Of Wyoming, Sheridan County

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INTRODUCTION

Twenty-five years ago, the Crow Tribe sued Wyoming officials to prohibit enforcement of Wyoming hunting and fishing laws against tribal members. The Tribe lost. The Tenth Circuit Court of Appeals interpreted the 1868 Treaty with the Crows and ruled that "the Tribe and its members are subject to the game laws of Wyoming." *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 994 (10th Cir. 1995).

When Wyoming prosecuted Herrera for killing a trophy bull elk without a license, however, Herrera argued that, despite *Repsis*, he was immune from prosecution as a member of the Crow Tribe. This Court should not reward Herrera's collateral attack by reinterpreting the Crow Treaty.

"One of the law's very objects is the finality of its judgments." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). After the appeals are over, the losing party must accept the court's answer. To protect against parties who refuse to respect final judgments, this Court imposes *res judicata*—either claim preclusion or issue preclusion—as a matter of federal common law. Litigants cannot return to court again and again seeking a different outcome.

Herrera presents several arguments as to why this Court should ignore the *Repsis* final judgment and reinterpret the Crow Treaty, but his claimed exceptions to finality are far broader than anything this Court has adopted. Moreover, because the preclusive effect of federal judgments—like the

decision in *Repsis*—is federal common law, a decision to reach the merits in this case will hearten losing parties across all areas of substantive law. This Court should decline to resolve the question presented entirely and affirm the Wyoming courts.

If this Court recognizes an exception to preclusion and decides the merits, it should affirm Herrera's conviction. Of the hundreds of Indian treaties negotiated by the United States, only two have the identical language presented here.[1] For both treaties, the courts have held that the off-reservation hunting right has expired.

The first decision was by this Court. In *Ward v. Race Horse*, this Court held that Congress intended the off-reservation hunting right in the Shoshone-Bannock Treaty to expire when Wyoming became a state. 163 U.S. 504 (1896). In 1999, this Court affirmed that holding. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999).

The second case was the Tenth Circuit's decision in *Repsis*, which held that the Crow Tribe's off-reservation hunting right has expired. Wyoming and its citizens have relied upon these interpretations, and the decisions are correct as a matter of law. Herrera's

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[1] Two months after signing the Treaty with the Crows, the United States, the Eastern Band of Shoshone, and the Bannock Tribe of Indians agreed to the Shoshone-Bannock Treaty. Except for reservation descriptions and payments, articles 1-12 of the two treaties are identical. *Compare* Treaty with the Eastern Band of Shoshonees and Bannacks, 15 Stat. 673 (1869), *with* Treaty with the Crows, 15 Stat. 649 (1868).

new interpretation disregards the text, the historical context, and the implementation of the Crow Treaty. The off-reservation hunting right has expired, and this Court should affirm his conviction.

STATEMENT OF THE CASE

In January 2014, Herrera and three companions climbed over a fence into Wyoming and killed four bull elk. When caught months later, Herrera asserted a tribal right to hunt in Wyoming, but the Wyoming courts rejected his claimed immunity because of more than 100 years of history and case law.

To interpret tribal treaty rights, this Court looks to "the larger context that frames the Treaty." *Mille Lacs*, 526 U.S. at 196. Wyoming offered this information to the trial court. (JA235). Herrera said an evidentiary hearing was unnecessary, (R.905), and the trial court dismissed the scheduled hearing when it ruled Herrera's treaty defense was unavailable. (Pet.App.43). The record before the Court therefore lacks required evidence about "the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Mille Lacs*, 526 U.S. at 196. Wyoming has attempted to use public documents, to the extent feasible, to provide this information.

A. The Fort Laramie Treaty of 1851

In 1851, the United States sought to protect settlers traveling the Oregon Trail. At the time, all of northern Wyoming was Indian Territory under the control of the War Department and subject to the restrictions of the Indian Intercourse Act of 1834. Regulation of Trade and Intercourse with the Indian Tribes, ch. 161, 4 Stat. 729 (1834); Bruce Blevins, *Mapping Wyoming* 9 (2007).

"[G]old had recently been discovered in California. Increasing numbers of people journeying westward were crossing the lands of the Indians. Buffalo and other game fell prey to the travelers' need for food (and sometimes their need for sport)." *Crow Tribe of Indians v. United States*, 284 F.2d 361, 364 (Ct. Cl. 1960). "The Indians resented these inroads, and their resistance often made the westward journey a perilous one." *Id.*

The Fort Laramie Treaty sought "to assure safe passage for settlers across the lands of various Indian Tribes; to compensate the Tribes for the loss of buffalo, other game animals, timber, and forage; to delineate tribal boundaries; to promote intertribal peace; and to establish a way of identifying Indians who committed depredations against non-Indians." *Montana v. United States*, 450 U.S. 544, 557-58 (1981) (*Montana II*). The 1851 Treaty did not "create a reservation" for any of the signatory tribes under the laws of the United States. *Id.* Rather, the Treaty subdivided Indian Territory (part of which would become Wyoming) into hunting districts "to establish, as between the

United States and the various signatory tribes, the boundaries of the lands of the tribes." *Crow Tribe*, 284 F.2d at 367.

B. The 1868 Treaty with the Crows

Right of safe passage to the Pacific was sufficient only if settlers traveled onward. Within a year after the discovery of gold in Montana, the Bozeman Trail brought so many outsiders that the agent for the Crow Tribe reported non-Indians "are now overrunning their whole country." Frederick Hoxie, *Parading through history: The making of the Crow nation in America, 1805–1935* 88 (1995).

At the same time, Indian policy in the United States evolved toward reservations in order to "restrict the limits of all the Indian tribes upon our frontiers, and cause them to be settled in fixed and permanent localities, thereafter not to be disturbed." *Cohen's Handbook of Federal Indian Law* § 1.03[6][a], Lexis (database updated July 2017) (quoting Commissioner of Indian Affairs George Manypenny).

In November 1867, with the Sioux Indians attacking settlers along the Bozeman Trail, representatives of the Crow Tribe met members of the Great Peace Commission. At the meeting, United States officials acknowledged the Tribe's "buffalo and game [were] driven off and [the Tribe's] grass and timber consumed by the opening of roads and the passing of emigrants through [Indian] countries." *Montana II*, 450 U.S. at 571 n.5. The United States offered the

Tribe "homes and cattle, to enable [them] to begin to raise a supply of stock with which to support [their] families when the game was disappeared" in return for permanent settlement on a reservation. Indian Peace Commission, *Proceedings of the Great Peace Commission of 1867 and 1868* 87 (1975).[2]

Like other nomadic Plains tribes, the Crow Indians relied primarily on buffalo for their sustenance. With the looming extermination of this food source, United States officials saw reservation life as the alternative to starvation. "Buffalo are the Indian's bread, but they are going away, and soon will be all gone, and the friends of the Indians want them, by that time, to have something else." *Annual Report of the Commission of Indian Affairs for 1873* at 500 (1873 statement by Felix Brunot to Crow Chief Blackfoot).

Off-reservation hunting rights were temporary measures to gain time. "When the buffalo is gone the Indians will cease to hunt. A few years of peace and the game will have disappeared." *Report of the Indian Peace Commissioners*, H.R. Exec. Doc. 97 at 18 (1868). "In the meantime by the plan suggested we will have formed a

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[2] Herrera quotes from this 1867 meeting to interpret the parties' later agreement. (Pet.Br.6-7). The Crow refused to sign a treaty at the end of the 1867 meeting, however, and Chief Blackfoot specifically rejected the reservation concept. "You speak of putting us on a reservation and teaching us to farm," but "[w]e were not brought up to do that and are not able to do that." *Peace Commission Proceedings* 88. "That talk does not please us." *Id.* Chief Blackfoot's speech at the treaty signing in 1868, acknowledging that the game would soon disappear, marked a change in his opinion and is more relevant to treaty interpretation.

nucleus of civilization among the young that will restrain the old and furnish them a home and subsistence when the game is gone." *Id. See also* Statement of General Hancock, *Peace Commission Proceedings* 14 ("There will soon be no necessity for the Indians to leave their reservations in search of subsistence, for the game will be gone.").

On May 7, 1868, the Crow Tribe and the United States agreed to the Treaty with the Crows. 15 Stat. 649 (1868). At the treaty signing, Chief Blackfoot acknowledged: "We were all raised on wild meat—buffalo, elk, mountain sheep, black-tailed & white-tailed deer. All that is getting scarcer every year. I know it [is] all going to be gone soon." Speech of Chief Blackfoot, Chief of the Crow Indian Tribe, May 6, 1868, in *Documents Relating to the Negotiation of Ratified and Unratified Treaties with Various Tribes of Indians, 1801-69* (Ratified Treaty 370, Documents Relating to the Negotiation of the Treaty of May 7, 1868, with the Crow Indians (available HeinOnline American Indian Law Collection)).

In Article 4 of the Treaty, the Crow agreed to "make said reservation their permanent home," accepting what this Court described in *Race Horse* as a "temporary and precarious" right to hunt off-reservation:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the

> right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

15 Stat. at 650; 163 U.S. at 510.

The Crow Treaty encouraged raising crops and livestock on the reservation, not a continuing nomadic life. *See United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 118 (1938) (Shoshone-Bannock Treaty, with identical language, evinces "purpose on the part of the United States to help to create an independent permanent farming community upon the reservation").

After 1868, the Tribe understood off-reservation hunting was temporary because the United States expressly said so. In 1873, when Felix Brunot and Chief Blackfoot discussed the Treaty, Brunot said tribal members could travel "across the river, where you go to hunt buffalo . . . while the buffalo are there; but when the game is gone away from there that is all to be white man's land." *Annual Report of the Commissioner of Indian Affairs for 1873* at 494. The off-reservation hunting right meant that "as long as there is peace between the Crows and the whites they may hunt buffalo where there are any and where there are not too many whites." *Id.* at 503.

In the period from 1870-75, "almost six million buffalo were slaughtered, and the species—except for a negligible number of animals which escaped and fled

to the north of the range, some of which crossed the Canadian border—was extinguished." Hans Huth, *Nature and the American: Three Centuries of Changing Attitudes* 163 (2d ed. 1990).

Even on the Crow reservation, game became scarce: "There is no game left upon their reservation at all worth speaking of and we shall have to have a much larger quantity of supplies than have been allowed us for the present fiscal year or the Crows will start to go over the [reservation] line." Hoxie, *Parading* 18 (Letter from Agent Henry Armstrong to Commissioner of Indian Affairs, Sept. 15, 1883). "To Armstrong, either outcome would have been disastrous, for the Montana Territory's burgeoning population resented the tribe's vast reserve of land and would have seized on any off-reservation hunting expeditions as evidence of the Indians' hostile intent." *Id.*

In 1883, the United States Army forced Crow Chief Crazy Head to return to the reservation while on an off-reservation hunt, and the Tribe stopped off-reservation hunting altogether. *See* Hoxie, *Parading* 113-15. Crow lands now "marked the limits of Crow mobility." *Id.* at 115.

While Herrera claims the Crow hunted off-reservation from 1868 through 1989, evidence before the Tenth Circuit in *Repsis* included deposition testimony from Crow officials that the Tribe stopped all off-reservation hunting by 1886. *Repsis* App., Vol. II at 376, 485, *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995) (No. 94-8097). Crow Indians were

prosecuted for poaching in the Bighorn Mountains as early as 1887. Calvin King, *History of Wildlife in the Big Horn Basin of Wyoming* 22 (1992). Indeed, Crows could be jailed for leaving the reservation without the permission of their agent from the 1880s until World War I. Hoxie, *Parading* 183.

"Because the buffalo were now nearly extinct and their Sioux and Piegan enemies were rapidly being replaced by American farmers and ranchers, [the Crow] knew crossing the Yellowstone or traveling south into Wyoming or east to the Powder River country would bring them into a hostile and barren land." Hoxie, *Parading* 122. Elk disappeared from the eastern slope of the Bighorn Mountains by the mid-1880s, and "game in the Big Horn Basin was practically extinct in 1900[.]" King, *History of Wildlife* 17, 19.

In 1884, the United States relocated the Crow Tribe to flatland alongside the Little Bighorn River, marking the Tribe's "confinement within the permanent boundaries of a modern reservation. Before 1884, the tribe could imagine that their life as a hunting people persisted; the founding of Crow Agency marked the beginning of the days after the buffalo had gone away and when other game could not sustain them." Hoxie, *Parading* 15. The Crow "shifted from a migratory hunting subsistence to a pattern of permanent residence in an agricultural community." *Id.* at 184.

C. *Ward v. Race Horse*

The Shoshone-Bannock Treaty of 1869 was signed two months after the Crow Treaty, and it is the only treaty with language identical to Article 4. 15 Stat. 673 (1869). The Eastern Shoshone and Bannock also understood this off-reservation hunting right was temporary. At a meeting with the Tribes, General Auger acknowledged that "[t]here are a great many white men in your country now, and as soon as the railroad is complete there will be many more." *Peace Commission Proceedings* 151. The United States would set aside land, and "[u]pon this reservation he wishes you to go with all your people as soon as possible, and to make it your permanent home." *Id.* at 152. The Tribes had "permission to hunt wherever you can find game," but "[i]n a few years the game will become scarce and you will not find sufficient to feed your people." *Id.* "You will then have to live in some other way than by hunting and fishing." *Id.* The tribes understood this truth. "I am willing to go upon a reservation, but I want the privilege of hunting the buffalo for a few years. When they are all gone far away we hunt no more; perhaps one year, perhaps two or three years; then we stay on the reservation all the time." *Annual Report of the Commissioner of Indian Affairs for 1868* at 658 (Remarks of Tygee, head chief of the Bannock).

In 1895, non-Indians killed three Bannock Indians and arrested others while the Indians were hunting in Jackson Hole, Wyoming. The State argued that the Indians had violated Wyoming game laws and were

killing animals indiscriminately, not for sustenance, but to sell their hides in trade. *See* 28 Cong. Rec. 6230-39 (1895-96) (statement of Del. Mondell). Both the United States and Wyoming agreed the dispute should be settled in court. *Annual Report of the Commissioner of Indian Affairs for 1896* at 58.

Wyoming charged two Bannock Indians with poaching, and the United States Attorney sought a writ of habeas corpus. *Id.* at 59. The lower court ruled Wyoming game laws were pre-empted by the Article 4 hunting right. *In re Race Horse*, 70 F. 598, 613 (Cir. Ct. D. Wyo. 1895).

On appeal, this Court reversed. *Ward v. Race Horse*, 163 U.S. 504 (1896). It held that the term "unoccupied lands of the United States" did not include "all such lands of the United States wherever situated, but only lands of that character embraced within what the treaty denominates as hunting districts." *Id.* at 508. "Hunting districts" were not simply "places where game was to be found," but were territory "beyond the borders of the white settlements." *Id.* at 508. "[T]he march of advancing civilization foreshadowed the fact that the wilderness, which lay on all sides of the point selected for the reservation, was destined to be occupied and settled[.]" *Id.* at 508-09.

The Treaty did not allow a tribal member to "seek out every portion of unoccupied government land and there exercise the right of hunting" because the "very object" of the Treaty was "[c]onfining him to the reservation" so his "tribal relations might be enjoyed

under the shelter of the United States" and away from "the new settlements as they advanced." *Id.* at 509. The right to hunt diminished "naturally . . . from the advance of the white settlements in the hunting districts to which the treaty referred" and when the land around the reservation "ceased to be a part of the hunting districts and came within the authority and jurisdiction of a State," the hunting right disappeared altogether. *Id.* at 510. Although Congress had the power to create treaty rights "which are of such a nature as to imply their perpetuity," the Shoshone-Bannock Treaty created only a "temporary and precarious" right, "essentially perishable, and intended to be of a limited duration" that expired upon Wyoming statehood. *Id.* at 515.

The *Race Horse* Court also held that the hunting right was incompatible with the Act admitting Wyoming into the Union under the equal footing doctrine. *Id.* at 514.

D. *Crow Tribe v. Repsis*

Citing a treaty right to hunt on the "unoccupied lands of the United States," the Crow Tribe sued Wyoming in federal court in 1992, seeking to prohibit Wyoming officials from enforcing state game laws against its tribal members. *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 992 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996) (No. 95-1560). The Tribe sued on its behalf and on "behalf of its members, namely members of the Crow Tribe." Amended Complaint, ¶ 2 (JA258).

The district court granted summary judgment to Wyoming. *Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1994). On appeal before the Tenth Circuit, the Crow Tribe distinguished *Race Horse* in the same way Herrera does now. The Tribe argued this Court had overruled, repudiated, and disclaimed every legal doctrine underlying *Race Horse*, especially the equal footing doctrine. *Repsis*, 73 F.3d at 988. *See also* Brief of Appellant at 16-21, *Repsis*, 73 F.3d 982 (No. 94-8097) (arguing that this Court: (1) "has expressly overruled the fiction of state 'ownership' of wild game[;]" (2) "rejected use of the Equal Footing Doctrine in the field of state regulation and jurisdiction over Indian treaty rights[;]" (3) declared "there is no irreconcilable conflict between the state power to regulate and the exercise of federal authority as mistakenly supposed in *Race Horse*[;]" and (4) "reversed" "the rules of treaty construction employed in *Race Horse*[;]" so therefore "there is nothing left of either the reasoning or the holding in *Race Horse*"). The Tribe asserted the equal footing doctrine was a "major premise" of the *Race Horse* decision despite this Court's repudiation of that doctrine as a limit on Indian treaty rights less than ten years later. *Repsis*, 73 F.3d at 990; *see also United States v. Winans*, 198 U.S. 371, 384 (1905).

The Tenth Circuit agreed that the equal footing doctrine "does not prevent the United States from creating a right in a territory which would be binding on the state upon its admission into the Union." *Repsis*, 73 F.3d at 991. But it held the 1868 Treaty did not convey such a right: "the privilege given was temporary and

precarious." *Id.* at 992. The Tenth Circuit held that because the Crow Treaty is identical to the Shoshone-Bannock Treaty construed in *Race Horse*, and because *Race Horse* held the hunting right expired when the hunting districts disappeared at Wyoming statehood, the Crow Tribe's off-reservation hunting right also had expired. *Id.* at 988-89 (citing *Race Horse*, 163 U.S. at 510).

The Tenth Circuit did not hold that the off-reservation hunting right was abrogated, as Herrera argues. (Pet.Br.19-32). Rather, the Court held the Treaty itself "does not give [the Tribe] the right to exercise this privilege within the limits of [Wyoming] in violation of its laws." *Repsis*, 73 F.3d at 989.

The Tenth Circuit adopted two additional rationales for applying Wyoming game laws to tribal members. The court held the creation of the Bighorn National Forest meant the land was no longer "unoccupied" within the meaning of the 1868 Treaty. *Id.* at 993. Wyoming made this argument in its brief to the District Court and on appeal. Brief of Appellee at 20-29, *Repsis*, 73 F.3d 982 (No. 94-8097); Brief of Defendants, *Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1995) (No. 92-CV-1002) found in *Repsis* App., Vol. II at 381-82. Reviewing the record below, the Tenth Circuit also held that "ample evidence" supported a ruling that Wyoming's restrictions on elk hunting were reasonable and necessary for conservation. *Id.* at 992-93.

E. *Minnesota v. Mille Lacs Band of Indians*

Four years after *Repsis*, in 1999, this Court ruled that Minnesota statehood did not abrogate, by implication, the Mille Lacs Band of Chippewa Indians' 1837 treaty right to hunt, fish, and gather wild rice. *Mille Lacs*, 526 U.S. at 208. *Mille Lacs* confirmed what *Repsis* had anticipated: the equal footing doctrine has not been a basis for terminating Indian treaty rights since 1905. *Compare id.* at 205 n.7 (citing *Winans*, 198 U.S. at 382-84), *with Repsis*, 73 F.3d at 991 (also citing *Winans*). The *Mille Lacs* Court held the relevant inquiry is whether Congress intended Indian treaty rights to be perpetual or to expire upon the happening of a clearly contemplated event. *Id.* at 206-07. "The Court did not, however, overrule the outcome in *Race Horse*, but rather preserved the ruling that the specific rights reserved in the Shoshone-Bannock treaty were intended to terminate upon statehood." *Cohen's Handbook*, § 18.04[2][e] n.60.

> The equal footing doctrine was only part of the holding in *Race Horse*, however. We also announced an alternative holding: The Treaty rights at issue were not intended to survive Wyoming's statehood. We acknowledged that Congress, in the exercise of its authority over territorial lands, has the power to secure off-reservation usufructuary rights to Indian Tribes through a treaty, and that "it would be also within the power of Congress to continue them in the State, on its admission into the Union." *Race Horse*, 163 U.S. at 515. We also acknowledged that if Congress intended the

> rights to survive statehood, there was no need for Congress to preserve those rights explicitly in the statehood Act. We concluded, however, that the particular rights in the treaty at issue there—"the right to hunt on the unoccupied lands of the United States"—were not intended to survive statehood. 163 U.S. at 514; *see* 163 U.S. at 514-15.

Mille Lacs, 526 U.S. at 206.

F. Herrera's conviction

In January 2014, Herrera traveled to the Montana-Wyoming border, crossed the fence built by the federal lessee who grazes cattle in the national forest there, and hiked three-quarters of a mile into Wyoming. (JA54,68-70,74-75). After spotting several bull elk, Herrera and his companions killed four. (JA54-55,185-86). In the Bighorn Mountains, the last day to hunt trophy bull elk was November 5, 2013, two months earlier. (R.581-90). Wyoming bans all elk hunting in the Bighorn Mountains from January until September so animals can survive the winter and raise young. (R.835-42).

A few days after killing the elk, Herrera emailed the Wyoming Game and Fish Department, stating he was a tribal game warden and offering to "help in any way we can to catch violators near our mutual borders." (JA241). Wyoming Game Warden Dustin Shorma met Herrera, and Herrera asked about Wyoming's forensic investigation capabilities. (JA30-34). Shorma later found a recent photograph on the

internet of Herrera displaying a bull elk, captioned "Good Year on the Crow Reservation." (JA34,38,242). Looking at the landscape, Shorma believed the photograph was taken in Wyoming. (JA43).[3]

After the snow melted in summer 2014, Shorma found four elk carcasses—three headless—just south of the Crow Reservation. (JA54-55). The location matched Herrera's photograph exactly. (JA52-62). Working with the Crow Tribe, Shorma cited Herrera, who handed over a mounted elk head that matched the DNA of one of the carcasses. (JA117,120-21,125-26,237).

Wyoming charged Herrera with (1) killing an antlered big game animal without a license or during a closed season and (2) helping others do the same. (Pet.App.5). Herrera moved to dismiss the charges, arguing his tribal membership allowed him to hunt the "unoccupied lands of the United States" regardless of Wyoming law. (R.368). The trial court denied his motion. (Pet.App.36-43). A jury convicted Herrera, and the judge sentenced him to probation and a fine. (R.1468-69). Herrera appealed to the Wyoming district court, which affirmed his conviction and sentence.

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[3] Before this Court, Herrera suggests he killed the elk for food to survive the winter, but Herrera did not raise a necessity defense below. (Pet.Br.13-14). If he had, Herrera would have had to explain why he left an entire elk to rot in the field, left meat on the other three elk, and hiked out with three elk heads as trophies, including the one in the photograph Herrera posted on monstermuleys.com (a website where hunters compare the size of their trophy kills). (JA34,38,52-53,55-57,231,240).

(Pet.App.3-35). The Wyoming Supreme Court denied certiorari. (Pet.App.1-2).

SUMMARY OF ARGUMENT

The Crow Tribe and Wyoming have already litigated the exact issue presented here. The Tenth Circuit ruled the Tribe and its members must obey Wyoming law. Herrera argues that final judgment does not prevent him from arguing the Tenth Circuit was wrong, but this Court should enforce the preclusive effect of *Repsis* and affirm Herrera's conviction.

As an initial matter, *Repsis* precludes Herrera from relitigating the Crow Treaty because all of the elements of issue preclusion are met. The question presented here is identical to the question resolved by the Tenth Circuit. The Crow Tribe litigated whether Article 4 of the Crow Treaty prevented Wyoming from prosecuting tribal members for hunting in the Bighorn National Forest. The Tenth Circuit interpreted Article 4 as a necessary part of its final determination. Because Herrera is in privity with his Tribe, he is bound by the result even though he was not personally named. The Crow Tribe had a full and fair opportunity to litigate its treaty rights and, as the plaintiff, had every incentive to forcefully press its arguments in the lawsuit it brought against Wyoming officials in federal court.

Herrera cannot avoid preclusion by arguing that the law has changed. *Mille Lacs* did not overrule *Race Horse*; it affirmed that "the right to hunt on the unoccupied lands of the United States" was not intended to survive Wyoming's statehood. 526 U.S. at 206. Moreover, this Court has never adopted the suggestion in the Restatement (Second) of Judgments that a change in law, by itself, should relax preclusion, and this is not the case for the Court to do so. Finally, because Herrera's treaty defense was an affirmative defense rather than an element of a charged crime, there is no fundamental unfairness or constitutional due process implication in applying the *Repsis* judgment to bar Herrera from relitigating the Treaty's meaning.

If this Court allows Herrera to relitigate his tribal treaty defense, it should still affirm Herrera's conviction. *Race Horse* was correct: Article 4 was a temporary right not intended to survive Wyoming's statehood. As the history and conduct of the parties establishes, Article 4 allowed the Crow Tribe—a tribe of Plains Indians who survived by hunting buffalo—to hunt on public domain lands to provide for its members. The parties intended, however, that this right continue only until tribal members could learn to cultivate the soil and provide for themselves within the confines of the reservation. Once the advance of civilization reached Crow reservation boundaries, the wilderness that had once surrounded the reservation disappeared and the land became occupied. Wyoming statehood was not just a legal event, it was a

recognition the once wild frontier was no more. And the Crow Tribe understood that its hunting right had ended. The Tribe stopped hunting off-reservation in 1886, as the history and the record in *Repsis* show.

If this Court concludes that Herrera retains the right to hunt off-reservation in the "unoccupied lands of the United States," his conviction should still be affirmed. Creation of the Bighorn National Forest was an act of occupation, placing that land outside of the ambit of the Crow Treaty right. Moreover, the federal government's control over the forest has a second effect. Federal regulations require Herrera to comply with Wyoming law before hunting in the national forest. He did not do so.

ARGUMENT

I. The Tenth Circuit's ruling in *Repsis* binds Herrera, and he cannot use this case to collaterally attack that final judgment.

The Crow Tribe and Wyoming have litigated the exact question presented here to final judgment, and the Tenth Circuit ruled that "the Tribe and its members are subject to the game laws of Wyoming." *Repsis*, 73 F.3d at 994; Amended Complaint (JA257-67).

Herrera cannot distance himself from the *Repsis* final judgment.[4] Under the general rules of issue preclusion, the analysis is not difficult. The only significant question is whether Herrera himself is bound by his Tribe's prior loss, and the Court's case law on the nature of tribal sovereignty says that he is.

Moreover, Herrera cannot avoid preclusion by arguing that the underlying law has changed. The *Mille Lacs* Court expressly preserved the "alternative holding" of *Race Horse* upon which the Tenth Circuit relied in *Repsis*. In addition, this Court has never adopted the Second Restatement of Judgments' broad exception for a "change in the applicable law" as Herrera proposes. It should not do so here. Finally, Herrera claims that because he is a criminal defendant, preclusion should not apply to him. But Herrera's claim of a tribal right was an affirmative defense, not an element of the crime, so the state court properly applied *Repsis* to bar his argument.

A. The *Repsis* decision binds Herrera and precludes him from asserting an off-reservation hunting right against Wyoming.

The preclusive effect of *Repsis* is a matter of federal common law. *Semtek Int'l Inc. v. Lockheed*

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[4] Although Herrera did not raise preclusion in his question presented, this threshold question dictates affirmance of his conviction, and Wyoming preserved the issue in its Brief in Opposition to a Writ of Certiorari. Sup.Ct.R.15.2.

Martin Corp., 531 U.S. 497, 507-08 (2001). This Court has held that "once an issue is [1] actually and necessarily determined [2] by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving [3] a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979) (*Montana I*).

Each element of issue preclusion is met here. First, the matter was actually and necessarily determined. In *Repsis*, the Tenth Circuit ruled that tribal members must comply with Wyoming's game laws. The court did so after the Tribe sought a declaration that tribal members "retain their treaty-reserved, off-reservation hunting and fishing rights on ceded, unoccupied, and public lands, and that such rights preclude state regulation." Complaint at Prayer for Relief (b) (JA265). The *Repsis* judgment not only actually resolved whether the members of the Crow Tribe are subject to Wyoming law, but the Tribe's Complaint that initiated the case demonstrates that the court necessarily did so.

Second, no party contests that the federal courts are courts of competent jurisdiction to interpret Indian treaties. *United States v. Thomas*, 151 U.S. 577, 585-86 (1894).

Finally, while Herrera was not a "party" in *Repsis*, his membership in the Crow Tribe binds him to the *Repsis* interpretation of the Tribe's off-reservation hunting right. Herrera argues that he cannot be bound because he was "all of ten years old" when *Repsis*

was decided. (Pet.Br.55). While non-parties are not generally bound by litigation, this Court recognizes "an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996) (citation omitted). As one exception, preclusion can arise from a "pre-existing 'substantive legal relationship.'" *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008).

The relationship of the Crow Tribe to Herrera is such a relationship. In *Repsis*, the Tribe sued "in its own behalf and in behalf of its members" as the "successor in interest to the Crow Tribe who was a party to the Fort Laramie Treaties of 1851 and 1868." Complaint ¶ 2 (JA258).

The Crow Tribe is "a distinct political society, separated from others, capable of managing its own affairs and governing itself." *United States v. Lara*, 541 U.S. 193, 205 (2004) (citation omitted). The fact of the Crow Treaty itself is recognition of the Tribe's authority to reach "an agreement or contract between two or more nations or sovereigns, entered into by agents appointed for that purpose, and duly sanctioned by the supreme power of the respective parties." *Cherokee Nation v. Georgia*, 30 U.S. 1, 60 (1831). If the Court denies the Tribe's ability to bind its members, this Court diminishes an "attribute[] of sovereignty," making the Tribe more like a "private, voluntary organization[]." *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

Having brought a dispute to the courts, the Crow Tribe and its members must respect the final judgment. Like other litigants, when a sovereign submits a dispute to the federal courts for resolution, the result binds the sovereign. *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 173 (1984). And when a sovereign is bound by a judgment, the judgment also binds its citizens. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 107 (1938); *Moses v. Dep't of Corr.*, 736 N.W.2d 269, 283 (Mich. Ct. App. 2007) ("Because plaintiff is claiming rights as a member of the Saginaw Chippewa Indian Tribe, [the court] find[s] that the requisite privity exists to apply the doctrine of collateral estoppel in this case.").

When this Court denied the Tribe's petition for a writ of certiorari in *Repsis* in 1996, the appeals were over. The judgment in *Repsis* became final. Herrera cannot both claim a tribal treaty right and simultaneously evade the final judgment that interprets that same right when that final judgment binds his tribe.

B. Herrera cannot evade issue preclusion by pointing to a change in law.

Herrera argues that this Court can ignore *Repsis* because the Tenth Circuit relied, in part, upon *Race Horse*, and *Mille Lacs* "thoroughly repudiated" *Race Horse*, and therefore "plainly changed the legal context" underlying *Repsis*. (Pet.Br.28&20).

Herrera is incorrect for two reasons. First, Herrera's interpretation of *Mille Lacs* is flatly inconsistent with that opinion. Second, the exception he identifies—comment c to § 28 of the Restatement (Second) of Judgments, which says that a change in law eliminates issue preclusion—is far broader than any exception adopted by this Court. Indeed, Herrera's formulation is broader even than the Restatement comment. This Court should not adopt this exception here.

1. *Mille Lacs* intentionally preserved the interpretation of the specific treaty language in *Race Horse*, so Herrera cannot argue that *Mille Lacs* undermined earlier decisions that relied upon that holding.

Wyoming does not dispute that this Court has rejected the doctrine of "equal footing" mentioned in *Race Horse* as resting "on a false premise" that Indian hunting rights are irreconcilable with state sovereignty. *Mille Lacs*, 526 U.S. at 204. Herrera argues that this case is about the "equal footing" doctrine, but Wyoming never relied upon this doctrine in the state courts below, and the Tenth Circuit did not rely on this doctrine in 1995 when it held that the Crow Tribe is subject to Wyoming game laws. Herrera's arguments about the equal footing doctrine and treaty "abrogation" are red herrings. He seeks to reverse his conviction based on reasons the state courts never adopted.

The equal footing doctrine "was only part of the holding" in *Race Horse*. *Mille Lacs*, 526 U.S. at 206. *Mille Lacs* re-affirmed what it said was *Race Horse*'s "alternative holding." *Id.* The *Race Horse* hunting rights—which are identical to the Crow Tribe's rights—had a "fixed termination point," and Congress "clearly contemplated" when it ratified the Treaty that "the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States." *Id.* at 207. "[T]he particular rights in the treaty at issue there—'the right to hunt on the unoccupied lands of the United States'—were not intended to survive statehood." *Id.*

Both *Repsis* courts had identified and followed this alternative holding before *Mille Lacs* expressly approved of it. The *Repsis* district court held that "the underlying fact pattern, including the treaty language at issue" in the Crow Treaty "precisely matches" the treaty in *Race Horse*, and lower courts "must follow the controlling decision." *Repsis*, 866 F. Supp. at 524. Similarly, the Tenth Circuit relied upon *Race Horse*'s determination that "it was the intent of Congress to repeal the right to hunt upon Wyoming's admission to the Union." *Repsis*, 73 F.3d at 991.

Only the *Mille Lacs* dissent argued that *Mille Lacs* "overruled" *Race Horse*. 524 U.S. at 220 (Rehnquist, C.J., dissenting). The Court majority, which of course was the master of its own holding, responded by explaining that not all "temporary and precarious" hunting rights expired upon statehood; however, some did, specifically the right in Article 4 of the

Shoshone-Bannock Treaty. Therefore, the Court stated, the dissent's contention in *Mille Lacs* that it had reversed *Race Horse sub silentio*—with the effect of resurrecting the Shoshone-Bannock (and Crow) Article 4 off-reservation hunting right—was incorrect.

The *Mille Lacs* Court merely held that statehood did not *automatically* extinguish tribal hunting rights which, like the Mille Lacs right, could be terminated through other means. The Court reasoned that a categorical rule based solely on whether the rights could expire in the future for any reason was "too broad to be useful as a guide to whether treaty rights were intended to survive statehood." 526 U.S. at 207. This holding did not prevent the *Mille Lacs* majority from explaining that in the particular case of the Shoshone-Bannock Treaty, statehood had indeed marked the expiration of the off-reservation hunting right. Thus, the *Race Horse* decision survived *Mille Lacs*, contrary to Herrera's reliance on the dissent's characterization.

Moreover, this Court should note the irony of Herrera's embrace of the *Mille Lacs* dissent. The dissent believed the Tribe's off-reservation hunting right had expired upon Minnesota statehood, differences between that 1837 treaty and the Shoshone-Bannock Treaty of 1869 notwithstanding. Properly understood, the views in *Mille Lacs* were: a five justice majority endorsing *Race Horse* on a narrow alternative holding, and a four justice dissent endorsing *Race Horse* on the broader basis that statehood necessarily extinguished the treaty right. *Race Horse*, at least as applied to the specific language

of Article 4 of the Shoshone-Bannock and Crow Treaties, emerged from *Mille Lacs* with the approval of a unanimous Court.

As one further irony, in its brief to this Court in *Mille Lacs*, the United States assured this Court that it could uphold the Mille Lacs Tribe's hunting right without overruling *Race Horse*'s contrary interpretation of a similar, but not identical, provision in the Shoshone-Bannock Treaty. The Mille Lacs majority expressly obliged. Now, the United States asserts that *Mille Lacs* constitutes a sufficiently tectonic shift in the legal landscape to overcome the preclusive effect of *Race Horse* and *Repsis*. This is just the sort of unfair incrementalism that this Court would invite if it endorses Herrera's fuzzy exception to finality.

This Court's decision in *Mille Lacs* to preserve *Race Horse*'s "alternative holding" provides clear direction. This Court does not permit "other courts [to] conclude [that] more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). *Race Horse* therefore has direct application for the Shoshone-Bannock Treaty and the one other Treaty negotiated at the same time with identical language: the Treaty with the Crows.[5]

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[5] It is unsurprising that the courts have not applied *Race Horse* since *Mille Lacs*. (United States Br. at 20-21). Article 4 has been interpreted with a final judgment for the only two treaties in which it appears.

Herrera's argument, then, cannot plausibly be that *Mille Lacs* changed the applicable legal context. His actual argument is that this Court should *change the law* to excuse issue preclusion. This cannot happen. "A system of law that places any value on finality—as any system of law worth its salt must—cannot allow intransigent litigants to challenge settled decisions year after year, decade after decade, until they wear everyone else out." *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1003 (10th Cir. 2015) (Gorsuch, J.) (*Ute VI*).

2. This Court allows a "change in the applicable legal context" to defeat issue preclusion only in limited circumstances, and Herrera's interpretation of this exception would be a dramatic expansion.

Herrera argues that a "change in the applicable legal context" defeats issue preclusion. (Pet.Br.46-48) (citing *Bobby v. Bies*, 556 U.S. 825, 834 (2009)). The Court's opinion in *Bies* cites to a comment from the Second Restatement of Judgments that "an intervening change in the relevant legal climate may warrant reexamination of the rule of law applicable as between the parties." Restatement (Second) of Judgments § 28 cmt. c (Am. Law Inst. 1982). This Court's brief reference in *Bies* to the Restatement should not be understood to revise the federal common law of issue preclusion, and the Court should not enshrine the Restatement's approach here.

This Court's longstanding case law on issue preclusion is considerably more protective of finality than the Restatement. Under this Court's opinions, litigants can escape issue preclusion only "for 'unmixed questions of law' in successive actions involving substantially unrelated claims." *Montana I*, 440 U.S. at 162. "Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases." *Id.* (quoting *United States v. Moser*, 266 U.S. 236, 242 (1924)) (emphasis by the Court). "But *a fact, question or right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." *Id.* (emphasis by the Court).[6]

Herrera's case does not fit this exception. As the Wyoming district court noted below, "the determination of the validity of the off-reservation treaty right is a mixed question of law and fact, and it involves the application of the same principles of law to historic facts that were complete by the time of the first adjudication" in *Repsis*. (Pet.App.25). The Crow Tribe's off-reservation hunting right was a "right distinctly adjudged" in *Repsis*, and "that right cannot be disputed

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[6] *Montana I* does suggest preclusion might be relaxed for "parties with an ongoing interest in constitutional issues" when preclusion would "freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." *Montana I*, 440 U.S. at 162-63. This is not a constitutional case.

in the present action, even if the determination was reached through an erroneous application of the law." (Pet.App.26) (following *Moser*, 266 U.S. at 242).

Moreover, nothing in *Bobby v. Bies* indicates that this Court's citation of the Restatement represented its adoption of the Restatement's broad exemption as a matter of federal common law. *Bies* did not cite *Montana I* or other case law. *Bies* dealt with issue preclusion as embodied in the Double Jeopardy Clause, not the concept of issue preclusion that applies to all federal decisions as a matter of federal common law. *But see Currier v. Virginia*, 138 S. Ct. 2144, 2156 (2018) (plurality opinion) (distinguishing Double Jeopardy Clause from modern civil preclusion principles).[7]

This exception from preclusion is narrow for good reason. The Restatement's broad exception encourages unhappy litigants to move into a state court and try again.

Litigants are bound by lower federal court decisions, but state courts are not bound by the lower

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[7] In *Bies*, Ohio had conceded in an earlier proceeding that the jury could consider Bies's mental impairment as a mitigating factor against capital punishment; the concession did not preclude Ohio from arguing Bies could still be executed after this Court held that the Eighth Amendment bars execution of mentally impaired offenders. 556 U.S. at 827-28. *Bies* held the elements of issue preclusion were not met, but even if they were, preclusion was inappropriate because an Eighth Amendment challenge presents a discrete issue, and "the change in law substantially altered" the State's incentive to contest mental impairment in the earlier proceeding. *Id.* at 836-37.

federal courts' interpretations of law. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 620 (1989). Only preclusion protects against a second try in state court. Under Herrera's approach, litigants can "disregard the binding effect" of the first loss and "attempt to relitigate . . . in a friendlier forum" whenever they can argue that something—a precedent or a principle—has somehow been undermined by this Court. *Ute VI*, 790 F.3d at 1003. If the stubborn litigant wins on the second try, then he creates a split in authority for this Court to address. If the second court catches on and imposes preclusion, that is of no moment. Review by this Court, for Herrera, not only evaluates whether there has been a "change in the applicable legal context" but also allows a potential victory on the merits even though the first judgment was final long ago.

This cannot be the law. Protective of its own authority, this Court demands that even when its precedents have "wobbly, moth-eaten foundations," lower courts must faithfully apply them to decide newly-filed cases with *different parties*, for whom relief is only possible through a grant of certiorari. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). The Restatement's approach is the opposite, encouraging the *same parties* to argue ceaselessly about the evolution of this Court's case law and leaving the question of whether to follow this Court's precedents to lower courts.

Herrera's approach is especially destructive of finality when the dispute involves sovereigns without natural lives, who can wait much longer for a shift in

this Court's jurisprudence. *Repsis* "was resolved nearly twenty years ago, the Supreme Court declined to disturb its judgment, and the time has long since come for the parties to accept it." *Ute VI*, 790 F.3d at 1012. This Court should not relax its longstanding rules on issue preclusion for Herrera.

C. No other exception permits Herrera to escape issue preclusion in this case.

1. Issue preclusion still applies to Herrera even though he is a criminal defendant.

Herrera argues issue preclusion is constitutionally dubious in the criminal context. (Pet.Br.56-57). He cites no rule directly on point, and the cases he identifies are irrelevant.

Herrera's cases about preclusion in the criminal context all involve using the doctrine to establish or refute elements of the charged crimes. (Pet.Br.56-57). Wyoming did not convict Herrera after an earlier jury had decided "an issue of ultimate fact" and acquitted him. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *United States v. Harnage*, 976 F.2d 633, 634 (11th Cir. 1992) (precluding relitigation of "evidentiary facts"). A prior guilty plea did not preclude Herrera "from relitigating an issue in a subsequent criminal proceeding." *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1243 (10th Cir. 1998); *United States v. Pelullo*, 14 F.3d 881, 889

(3d Cir. 1994) (rejecting issue preclusion for an element of the crime).

To convict Herrera, Wyoming had to prove the elements of the charged crimes beyond a reasonable doubt. Wyoming proved that (1) "on or about the 18th of January, 2014;" (2) "in Sheridan County, Wyoming;" (3) "the defendant, Clayvin Herrera;" (4) "did knowingly take;" (5) "an antlered elk;" (6) "during a closed season." (R.1412); Wyo. Stat. Ann. § 23-3-102(d). For the second charge, the State proved that (1) "on or about the 18th day of January, 2014;" (2) "in Sheridan County, Wyoming;" (3) "the defendant, Clayvin Herrera;" (4) "aided the knowing taking;" (5) "of an antlered elk;" (6) "during a closed season." (R.1413); Wyo. Stat. Ann. § 23-6-205(a).

In Wyoming, defendants have the burden of production to present a prima facie case for an affirmative defense. *Duckett v. State*, 966 P.2d 941, 948 (Wyo. 1998). Like other "circumstances of justification, excuse, or alleviation," a tribal hunting right is an affirmative defense. *Patterson v. New York*, 432 U.S. 197, 202 (1977). "Proof [beyond a reasonable doubt] of the non-existence" of an affirmative defense by the government "has never been constitutionally required." *Id.* at 210. When Herrera asserted a tribal hunting right, he stepped into the shoes of the Crow Tribe, the sovereign who negotiated the treaty with the United States. *Antoine v. Washington*, 420 U.S. 194, 205 (1975); *United States v. Dion*, 476 U.S. 734, 738 n.4 (1986). At its heart, Herrera's claim of a treaty right is a claim of federal pre-emption that has no relationship to the

crime charged or the State's burden of proof. There is nothing constitutionally dubious about the conclusion that, if the Crow Tribe cannot assert a treaty hunting right against Wyoming because of preclusion, then its members cannot either.

2. The Crow Tribe is precluded from challenging the Tenth Circuit's decision that the Bighorn National Forest is occupied.

Herrera argues the Tenth Circuit's holding that Bighorn National Forest is occupied for purposes of the Crow Treaty does not bind either the Tribe or himself. He argues the court denied the Crow Tribe a "full and fair opportunity" to litigate the issue and that an "alternative holding" has no preclusive effect. (Pet.Br.50-53). Herrera has not accurately recounted the *Repsis* litigation, and he cannot avoid preclusion by attacking the Tenth Circuit.

The Crow Tribe had ample opportunity in *Repsis* to dispute whether the Bighorn National Forest was occupied. Before the district court, Wyoming argued the Bighorn National Forest was occupied because, in part, "Congress passed numerous acts establishing and regulating federal lands including the Big Horn National Forest." Response Brief of Defendants at 7-8, *Repsis* App., Vol. II at 381-82. Wyoming renewed this argument on appeal from summary judgment, making it far from a "bolt from the blue." *Compare* Brief of Appellee 20-29, *Repsis*, 73 F.3d 982 (No. 94-8097) *with*

(Pet.Br.53-54). And, as Herrera concedes, the Tribe addressed the issue in its reply. (Pet.Br.53-54). Moreover, "[t]he values of preclusion would be destroyed if proof of the quality of the decision were required of the party asserting preclusion or permitted to the party opposing it." 18 Charles Wright et al., *Federal Practice & Procedure* § 4423 (3d ed. 2016).

Herrera's final argument against preclusion is that *Repsis*'s ruling that the Bighorn National Forest was "occupied" is an alternative holding. He cites another comment from the Restatement (Second) of Judgments that, if a "judgment by a court of first instance" relies on "determinations of two issues" that independently support the result, then the judgment is not preclusive on either issue. (Pet.Br.50 (citing Restatement (Second) of Judgments § 27 cmt. i)).

This Court has never adopted the position urged by the Restatement; its longstanding rule has been the opposite. "[W]here there are two grounds . . . each is the judgment of the court and of equal validity with the other." *United States v. Title Ins. & Tr. Co.*, 265 U.S. 472, 486 (1924). More fundamentally, Herrera's argument conflates the *Repsis* judgment—the basis for issue preclusion—with the *Repsis* reasoning. "With issue preclusion, it is the prior judgment that matters, not the court's opinion explaining the judgment." 18 *Moore's Federal Practice (Civil)* § 132.03, Lexis (database updated September 2018). *Repsis* held that tribal members must follow Wyoming law in the Bighorn National Forest because it is not "unoccupied

land[] of the United States" under the Crow Treaty. *Repsis* provided two explanations for this judgment: (1) land belonging to the United States ceased to be "unoccupied" when Wyoming became a state; and (2) "the creation of the Big Horn National Forest resulted in the 'occupation' of the land." *Repsis*, 73 F.3d at 993. These were two explanations for the same ruling, not different judgments.

The courts have interpreted the Crow Treaty already, and the judgment is final. This Court's inquiry should stop here, and it should affirm the respect for finality demonstrated by the Wyoming courts.

II. The Treaty with the Crows does not grant tribal members the right to hunt in the Bighorn National Forest in Wyoming.

Herrera's claimed treaty hunting right should be resolved as the Wyoming courts did: through issue preclusion. If this Court reaches the merits of the question presented, it should affirm the decision it reached 122 years ago in *Race Horse* when examining identical treaty language—the off-reservation treaty right was "not intended to survive Wyoming's statehood." *Mille Lacs*, 526 U.S. at 206. This conclusion is not only entitled to respect as *stare decisis*, it is entitled to respect because it is correct.

Herrera argues the Crow Tribe thought that land could only be occupied by the "actual, physical presence of non-Indian settlers." (Pet.Br.34-35). This interpretation is contrary to the treaty's text, ignores

its historical context, and is inconsistent with the behavior of the Tribe and the United States.

A. Article 4 provided authority for the Crow Tribe to seek game outside the reservation boundaries only until non-Indians began to occupy the wilderness surrounding the reservation.

Indian treaties are "construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11 (1899). Treaty language matters, however, and a court cannot disregard "the obvious, palpable meaning of the words of an Indian treaty" because "in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians." *United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900). Courts must follow treaty language "that, viewed in its historical context and given a fair appraisal, clearly runs counter to the tribe's claims." *Or. Dep't of Fish and Wildlife v. Klamath Indians Tribe*, 473 U.S. 753, 774 (1993).

Interpretation requires the Court to examine the text, the treaty's historical context, and the understanding of the parties as reflected in the treaty's implementation. Each of these inquiries demonstrates that the Crow Tribe's off-reservation hunting right has expired. The text of Article 4, when read as a whole, provides only for a limited right. When reading the

treaty in its historical context—a time when the United States sought to sequester tribes from incoming settlements and allow a transition to agriculture—the temporary nature of the hunting right becomes evident. Finally, post-ratification implementation of the Crow Treaty indicates that both parties believed the off-reservation hunting right ended around the time of Wyoming statehood. Statehood was not, as Herrera suggests, a legal event that abrogated the off-reservation hunting right. Wyoming statehood represented a moment when all concerned could agree that the off-reservation hunting right had expired as envisioned by the 1868 Treaty.

1. The text of Article 4 of the Crow Treaty demonstrates that the Tribe's hunting right is limited to areas of wilderness before the arrival of non-Indians.

The text of Article 4 demonstrates that the Tribe's off-reservation hunting right is limited to the territorial wilderness. While the treaty phrase "unoccupied lands of the United States" could be read more broadly, those words "cannot be considered alone, but must be construed with reference to the context in which they are found." *Race Horse*, 163 U.S. at 508.

In the 19th century, unoccupied lands were not simply vacant lands; they were lands that could become occupied. *See, e.g.*, *Hutton v. Frisbie*, 37 Cal. 475, 486 (Cal. 1869) (Acts to pre-empt title derived

from Mexican government "were intended to give those who were pioneers in the unsettled wilds of the public domain the first right to purchase the *unoccupied lands* which they have had the courage and hardihood to settle . . . ") (emphasis added).

The "unoccupied lands of the United States" have a more common description: lands in "the public domain." "The public domain was the land owned by the Government, mostly in the West, that was available for sale, entry, and settlement under the homestead laws, or other disposition under the general body of land laws." *Hagen v. Utah*, 510 U.S. 399, 412 (1994). Public domain land could be settled by private parties, but "[f]rom an early period in the history of the government it was the practice of the President to order, from time to time, parcels of land belonging to the United States to be reserved from sale and set apart for public uses." *Id.* (internal punctuation omitted). Reservations from the public domain served various purposes, including "Indian settlement, bird preservation, and military installations." *Id.*

The justices on the *Race Horse* Court understood this meaning. The Court interpreted the phrase to mean "lands owned by the United States, and the title to or occupancy of which had not been disposed of." 163 U.S. at 508. *See also id.* at 509-10 (Court refers to "unoccupied public land of the United States").

In order for the other words in Article 4 to have meaning, however, they must be read to limit the off-reservation hunting right. The right to hunt on

unoccupied lands exists only "so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 16 Stat. 50.[8]

Hunting districts in the Treaty were not simply "places where game was to be found" or else the Treaty would not refer to "peace on the borders" of the districts. 163 U.S. at 508. Peace "among whites and Indians" on the "borders" of the hunting districts was similarly irrelevant if homesteaders had already arrived within the territory and were "no longer beyond the borders of the white settlements." *Id.* The best reading of Article 4 as a whole, then, is that the "unoccupied lands of the United States" are "lands of that character embraced within what the treaty denominates as hunting districts." *Id.*[9]

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[8] In *Repsis*, Wyoming argued that even if the hunting right continued after statehood, the game was gone, and the treaty does not permit tribal members to hunt a new resource that exists only through State investment. *Repsis* App., Vol. I at 265, 271-72 (demonstrating no viable population of elk existed in the Bighorn Mountains by 1909 and recovery came through Wyoming's actions). Wyoming also asserted that laches prevents the Tribe from reviving a hunting right it abandoned 100 years ago. *Id.* at 176. Because Wyoming prevailed on other grounds below, these arguments are not before this Court. Wyoming will raise these objections on remand, if needed.

[9] Interestingly, the Treaty does not limit Crow hunters to "unoccupied lands" within a specific hunting district identified for the Crow Tribe in the 1851 Treaty. Article 4 refers to "borders of the hunting districts" in the plural. This is unsurprising, given that the tribes that signed the 1851 Treaty did not cede territory to create the hunting districts, either to the United States or to one another. Treaty of Fort Laramie, Art. 5 (1851) (found in 2

The term "hunting districts" describes lands as they were at the time the Treaty was negotiated. "When in 1868 the treaty was framed, the progress of the white settlements westward had hardly, except in a very scattered way, reached the confines of the place selected for the Indian reservation." 163 U.S. at 508. The hunting districts were "wilderness" that had not yet seen the "march of advancing civilization." *Id.*

Unlike "unoccupied lands," the term "hunting districts" was not in common use; it appears only in the 1851 Treaty of Fort Laramie. In that document, hunting districts are the labels for areas within Indian Territory, described so travelers on the Oregon Trail could know which tribal land they crossed and the Army could hold specific tribes accountable for predation. *Montana II*, 450 U.S. at 557-58. The reference to hunting districts in the 1851 Treaty was not a grant of authority or title to the signatory tribes; "the 1851 treaty did not by its terms formally convey any land to the Indians at all, but instead chiefly represented a covenant among several tribes which recognized specific boundaries for their respective territories." *Id.* at 553. *See also United States v. N. Pac. Ry. Co.*, 311 U.S. 317, 349 (1940) (noting the Court has repeatedly held 1851 lands "were Indian country, subject only to the Indians' right of occupancy").

Charles J. Kappler, *Indian Affairs: Laws and Treaties* 594-95 (1904)) (Tribes "do not hereby abandon or prejudice any rights of claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described").

"Hunting districts" were not simply "places where game was to be found," but reflected territory "beyond the borders of the white settlements." *Race Horse*, 163 U.S. at 508. Therefore, when Article 4 provided that tribal members could hunt on unoccupied lands so long as peace prevailed on the borders of the hunting districts, the question of whether such lands remained unoccupied depended on whether the lands were beyond the borders of white settlements, not on whether, as Herrera argues, such lands lacked physical improvements.

2. Wyoming statehood did not abrogate the Tribe's hunting right; it reflected congressional recognition that the land identified in 1851 as "hunting districts" had permanently transformed.

The interaction of the phrase "hunting districts" and the "unoccupied lands of the United States" must also be understood in the historical context of reservation policy in the 1860s.

The "very object" of the Crow Treaty was to confine tribal members to a reservation separate from "the new settlements as they advanced." *Race Horse*, 163 U.S. at 509. Reservations were intended to "keep distance and peace between Indians and non-Indians." William C. Canby, Jr., *American Indian Law in a Nutshell* 21 (6th ed. 2015). When the Great Peace Commission convened in the late 1860s, the "principal cause of complaint" of the Indian tribes was "the fact

that the whites are invading their territory, cutting roads wherever they please, running railroads without stint, and building forts and filling them with soldiers, thereby driving all game from the country and depriving the Indians of the means of living." *Indian Peace Commission*, N.Y. Times, Sept. 29, 1867, at 4.

The transition to reservation life was particularly important for Plains Indians, who would perish after the buffalo disappeared if they did not adopt an agricultural lifestyle. Reservation policy did not envision that a tribal member could continue to "seek out every portion of unoccupied government land and there exercise the right of hunting" even if that parcel of land was in "already established States." *Race Horse*, 163 U.S. at 509. Such travel delayed the development of an agrarian lifestyle and magnified the potential for conflict, even on land that was still in the public domain. This is because, throughout western expansion, non-Indians raised livestock not just on their homesteads but on all nearby unoccupied land. *Buford v. Houtz*, 133 U.S. 320, 326 (1890) (recognizing "an implied license, growing out of the custom of nearly a hundred years" to graze lands in the public domain "especially those in which the native grasses are adapted to the growth and fattening of domestic animals").[10]

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[10] The *Race Horse* litigants presented this concern to the Court, noting Race Horse hunted on land that was "used by the settlers as a range for cattle, and was within election and school districts of the State of Wyoming." 163 U.S. at 507. The Court

If the phrase "unoccupied lands of the United States" encompassed all land in the public domain anywhere, then the Treaty did not create the separation needed "to protect [tribal] rights and to preserve for [each Indian] a home where his tribal relations might be enjoyed under the shelter of the authority of the United States." *Race Horse*, 163 U.S. at 509. Travel off-reservation created danger, as incoming settlers seized "on any off-reservation hunting expeditions as evidence of the Indians' hostile intent." Hoxie, *Parading* 18.

The *Race Horse* Court understood reservation policy, in the 19th century, was a policy of separation. The Court also understood that the words of Article 4 created only a temporary right to hunt off-reservation which would terminate with the settlement of the West.

B. The historical implementation of the Crow Treaty indicates that the off-reservation right to hunt ended at the time of Wyoming statehood.

Shortly after signing the 1868 Treaty, the United States explained that the Crow Tribe's off-reservation right was not available "where there are too many whites." *Annual Report of the Commissioner of Indian Affairs for 1873* at 503. "[T]he march of advancing civilization foreshadowed the fact that the wilderness,

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concluded that the actual use of the land was not relevant to the interpretation of the treaty right it adopted.

which lay on all sides of the point selected for the reservation," would soon be "occupied and settled." *Race Horse*, 163 U.S. at 508-09.

This march of civilization ended at statehood. By the mid-1870s, the buffalo were gone. In 1880, Indian Department regulations instructed Indian agents to inform tribal members that "they must confine their movements wholly within the limits of their respective reservations, that under no pretext must they leave the same without a special permit." Section 235 *Ins.* 1880 (as published in *Regulations of the Indian Department* § 492 (1884)).[11] The United States Army forced Crow Chief Crazy Head to return to the reservation when he sought to hunt elsewhere in 1883. The United States relocated the Crow Tribe to agricultural flatland in 1884. In 1886, the Crow ceased off-reservation hunting. By the time Congress granted statehood to Wyoming (1890) and Montana (1889) and Idaho (1890), all parties understood that the time for hunting had passed.

The *Race Horse* Court's conclusion that the hunting right had expired reflects the 19th century understanding of not just the *law* of statehood but what statehood represented. "[C]entral to the original conception of the territorial system" was the idea that

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[11] The 1904 Regulations of the Indian Office are even more clear about the places Indians may not travel: tribal members "will not be allowed to roam away from their reservations without any specific object in view, nor will they be allowed to *trespass upon the public domain*." *Regulations of the Indian Office* § 585 (1904) (emphasis added).

early settlers would, through territorial government "achieve self-government in a developing political community that eventually would be welcomed into the Union." Peter S. Onuf, "Territories and Statehood" (*Encyclopedia of American Political History* 1283, 1284 (1984)). Political leaders saw early settlers as "uninformed, and perhaps licentious people" whose "routine defiance of state and federal land laws" was but one disagreeable aspect of the character needed to settle the rough frontier. *Id.* at 1283. Statehood, in contrast, was not just a legal act; it was congressional recognition that these individuals no longer held sway.

This was the moment when civilization arrived. It is also, then, the logical time when hunting districts ceased and territory came "within the authority and jurisdiction of a State." *Race Horse*, 163 U.S. at 509; *see also Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 927 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999) ("The standard of when 'unoccupied' lands become 'occupied' is certainly vague, and could logically include the grant of sovereignty to a newly formed state.").[12]

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[12] The statutes providing for land sales by the Crow Tribe in 1891 and 1904 do not affect the analysis. While each statute contains a savings clause that these later acts do not alter the tribe's treaty rights, no party argues that the land sales statutes affected the hunting right as a legal matter. Herrera's argument "rests on the assumption that there was a perpetual right conveyed by the treaty," and this Court rejected that conclusion. *Race Horse*, 163 U.S. at 515.

C. The Tribe understood land could be "occupied" without physical presence.

Herrera offers an interpretation of "unoccupied lands of the United States" that no member of the *Race Horse* Court, no court ever, has adopted. Herrera agrees that the tribal right to hunt does not exist on land where "the whites" have "settled." (Pet.Br.34). He appears to concede that no right to hunt exists on private land at all, even if the owners are absent at a specific moment. (*Id.*) (noting the "tracts of land" where "the whites" eventually settled "would become occupied").[13] But Herrera argues the Crow Tribe would not have understood land was occupied without "actual, physical presence of non-Indian settlers." (Pet.Br.34-35).

Herrera's interpretation is incorrect. The Treaty with the Crows demonstrates that the Tribe understood "occupation" without physical presence. Article 2 reserved land for "the absolute and undisturbed use and occupation of the Indians herein named." 15 Stat. at 650. This phrase means "for all practical purposes, the tribe owned the land" and "no beneficial interest" other than "naked fee" was held by the United States. *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938). This phrase grants the Crow Tribe "the implicit power to exclude others from the

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[13] The *Race Horse* Court described the treaty hunting right as "temporary and precarious" not simply because it could expire; the right was temporary and precarious because its application in any particular location "was to cease whenever the United States parted merely with the title to any of its lands." 163 U.S. at 515.

reservation." *South Dakota v. Bourland*, 508 U.S. 679, 688 (1993).

Both the Crow and the United States understood the importance of the power to exclude. The 1868 Treaty reserved eight million acres, or 12,500 square miles, for the exclusive use and occupation of approximately 2,000 people. Joe Medicine Crow, *From the Heart of Crow Country* 12, 14 (1992) (noting smallpox had lowered Crow population from 8,000 in the 1830s to 2,000 by 1870). For perspective, the State of Maryland contains about six million acres.

"Under the treaty a relatively few Indians were to 'occupy' millions of acres of land within the meaning of the treaty, which suggests that the signatory Indians' understanding would not necessarily require actual physical presence or use to change land from an 'unoccupied' to an occupied status." *State v. Cutler*, 708 P.2d 853, 857 (Idaho 1985) (construing identical language in the Shoshone-Bannock Treaty). Tribal members knew that this grant of "exclusive use and occupation" meant that "no persons, except a few specially enumerated, and governmental agents engaged in the discharge of duties enjoined by law, should 'ever be permitted to pass over, settle upon, or reside' in the territory so reserved" without the Tribe's permission. *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 486 (1937).

If the sheer size of the Crow Reservation does not demonstrate that "physical presence" was not required for occupation, the Tribe had experience with the

behavior of the United States. Four years after the 1868 Treaty, the United States created Yellowstone National Park, preventing its settlement and "proceeding immediately to forbid hunting in a large portion of the Territory" of the hunting district without establishing an actual physical presence throughout that place. *Race Horse*, 163 U.S. at 510.[14]

Herrera's argument about physical presence also misunderstands the nature of settlement in the Rocky Mountain West. The area lacks abundant moisture and fertile soil. "[P]ublic lands in the West" were, as President Roosevelt concluded, "suitable chiefly or only for grazing." Message of Theodore Roosevelt to the Senate and House of Representatives (December 2, 1902) (15 *A Compilation of the Messages and Papers of the Presidents* 6725 (1909)). "[I]n the grazing region the man who corresponds to the homesteader may be unable to settle permanently if only allowed to use the

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[14] The legislative history cited by the United States is inconclusive. (Br. of United States at 25-26). Senator Harlan noted the treaty was "expected to induce the Indians to settle down and engage in pastoral and agricultural pursuits." Cong. Globe, 40th Cong., 3d Sess. 1348 (1869). Nevertheless, he explained, "There is, I think, in the same treaty, a provision permitting these Indians to hunt, so long as they can do so without interfering with the settlements." *Id.* Yellowstone was not settled, but its creation reflected an immediate congressional decision that not all lands needed "settlements" to lie beyond the off-reservation right. Moreover, when Senator Harlan qualified his understanding with "I think," he not only indicated to his colleagues that he was uncertain about the Treaty's meaning, but he also showed why "[s]ubsequent legislative history is a 'hazardous basis for inferring the intent of an earlier Congress.'" *Jones v. United States*, 526 U.S. 227, 238 (1999).

same amount of pasture land that his brother, the homesteader, is allowed to use of arable land. One hundred and sixty acres of fairly rich and well-watered soil, or a much smaller amount of irrigated land, may keep a family in plenty, whereas no one could get a living from one hundred and sixty acres of dry pasture land capable of supporting at the outside only one head of cattle to every ten acres." *Id.*

Wyoming's heavy reliance on cattle and sheep ranching further demonstrates why Herrera's focus on "actual, physical presence" is incorrect: tribal leaders understood that land with cattle was occupied, but land with cattle was often in the public domain.

In 1870, the Wyoming Territory had 8,143 cattle. T.A. Larson, *History of Wyoming* 165 (1965). Fifteen years later, Wyoming's Territorial Governor reported that ranching was ninety-percent of the state's economy, and its 894,788 cattle "roam in every valley and drink from every stream in the territory." *Id.* at 167. The Crow long understood that cattle would appear when the bison disappeared and that cattle meant the settlers had arrived. *Cutler*, 708 P.2d at 859 (cattle are an "indicium of occupancy"). *See* Frank Linderman, *Plenty-Coups, Chief of the Crows* 40-41 (2d ed. 2002) (Crow Chief Yellow-Bear told Chief Plenty-Coups that in Plenty-Coups' lifetime, "the buffalo will go away forever" "and that in their place on the plains will come the bulls and cows and calves of the white men.").

Herrera's theory that tribal members could hunt anywhere they could not discern actual, physical presence—unless, of course, the land was private property—would have created conflict. Private property with an absent owner could be off-limits, and land with cattle in the public domain could appear occupied. Herrera's theory would have required tribal members to understand survey lines and land patents in order to discern the true status of land they hunted, and this cannot be the intended meaning of either the United States or the Crow Tribe.

D. This Court should honor *stare decisis* by maintaining its current interpretation of the phrase "unoccupied lands of the United States."

Under the doctrine of *stare decisis*, once this Court has fully considered and decided an issue, it is not reexamined again and again. Wyoming and its citizens have relied on the interpretation from *Race Horse* for 122 years, and *stare decisis* "has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision[.]" *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).[15]

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[15] Herrera and the United States are somewhat vague as to whether private land is outside of his tribal hunting right. This means that a ruling in Herrera's favor will also dramatically disrupt the settled expectations of private property owners who for more than 100 years have believed they have the right to exclude others from hunting or crossing their property. Such a

In 1896, this Court held that the right to hunt on "unoccupied lands of the United States" in Wyoming was "not intended to survive statehood." *Mille Lacs*, 526 U.S. at 206. "This Court does not overturn its precedents lightly." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014). "Considerations of *stare decisis* have special force in the area of statutory interpretation" because Congress can override the Court's decisions with contrary legislation. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

In 1900, there were no elk on the eastern slope of the Bighorn Mountains. Calvin King, *Reestablishing the Elk in the Bighorn Mountains* 1 (1963). (R.519). In 1909, Wyoming began a four-decade conservation effort to reintroduce elk in the Bighorn Mountains, moving captured elk by sleigh over Teton Pass from Jackson Hole, Wyoming, into Idaho, by wagon to a nearby railroad station, and then by railroad car to the Bighorn Mountains. *Id.* at 8-18 (R.523-28). With this re-introduction, with the re-introduction of Bighorn Sheep, and with other efforts at species preservation, Wyoming has developed and implemented a complex scheme of wildlife management and conservation in the Bighorn Mountains, and it has earned public support (and investment) with the understanding that Wyoming's authority is unquestioned. Moreover, Wyoming's management not only protects elk, but it

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holding also arguably conflicts with *Montana II*, which concluded that the Crow Tribe had no demonstrated interest in regulating hunting and fishing on privately owned land *within* the reservation. 450 U.S. at 565-67.

uses this species to provide funding to conserve hundreds of other animals, from the grizzly bear to the sage grouse to the black-footed ferret. *See 2017 State Wildlife Action Plan* (https://bit.ly/2pRaS6Z).

The members of the *Race Horse* Court, having lived through the three decades of western expansion after the Civil War, were well-positioned to interpret the language of Article 4. They had watched the buffalo disappear from the Great Plains, leaving nomadic tribes like the Crow Indians to adapt or vanish. The Court understood how the phrases "unoccupied lands of the United States" and "hunting districts" interacted with the United States' Reservation Policy because these were the current events of daily life. This Court should adopt their conclusion that Article 4's "temporary and precarious" off-reservation hunting right has expired, because their analysis was informed by more legal and historical context than the parties here could ever present. And it is correct.

III. By withdrawing the Bighorn National Forest from the public domain, the United States occupied that land within the meaning of the Crow Treaty.

Wyoming does not argue that President Cleveland "abrogat[ed] Indian treaty rights when creating" the national forest. (Pet.Br.39). When he declared a national forest reserve in the Bighorn Mountains, President Cleveland removed these lands from the

public domain. When lands are no longer in the public domain, the Treaty itself says they are no longer within the ambit of the off-reservation hunting right.

A. President Cleveland's proclamation changed the character of the Bighorn National Forest lands.

In the 19th century and now, the federal government can occupy land through its exercise of dominion and control, and creation of the national forest was exercise of the United States' "power of reservation" to remove land from settlement because "the public interest would be served by withdrawing or reserving parts of the public domain." *Hagen*, 510 U.S. at 412.[16]

The Forest Reserve Act provided authority to "set apart and reserve" in "any State or Territory having public land bearing forest" the land "wholly or in part covered with timber" as a "public reservation." Timber Culture Repeal (Forest Reserve Act), ch. 561, § 24, 26 Stat. 1095 (1891). President Cleveland proclaimed the Bighorn National Forest was "reserved from entry or settlement and set apart as a Public Reservation." Proclamation No. 30, Grover Cleveland (Feb. 22, 1897), 29 Stat. 909.

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[16] If this Court concludes the Bighorn National Forest is unoccupied as a matter of law, the United States agrees Wyoming is entitled to a remand to offer factual evidence of occupation. (Br. of United States at 29).

The declaration of a national forest is no different than creation of a military reservation or an Indian reservation. The United States orders that land in the public domain "be reserved from sale and set apart for public uses." *Grisar v. McDowell*, 73 U.S. (6 Wall.) 363, 381 (1868). Tribal leaders had visited military outposts in 1867, so they "undoubtedly understood that a governmental unit could 'occupy' lands within the meaning of the treaty." *Cutler*, 708 P.2d at 857. The Crow Tribe's occupation of its reservation was similar; the Tribe did not live everywhere on the land but it had the right to prevent entry and settlement by others.

As *Race Horse* noted, the creation of Yellowstone "forbid hunting in a large portion of the Territory" of a hunting district. 163 U.S. at 510. That statute used words similar to those in President Cleveland's proclamation: the land was "reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States and set apart as a public park or pleasuring-ground." ch. 24, § 1, 17 Stat. 32 (1872).

At the time, President Cleveland's declaration of numerous national forests was controversial. In response, Congress enacted the Organic Act of 1897, and this statute also reflects the understanding that the forest had been reserved and the sovereign would henceforth manage the forest as its own private property. ch. 2, 30 Stat. 11 (1897). The Organic Act suspended President Cleveland's designations and the "lands embraced therein" were "restored to the public domain." 30 Stat. at 34. If the forest was not "otherwise disposed of" within a year after enactment of the

Organic Act, and the Bighorn National Forest was not, then the President's designation became effective again. *Id.* The act also authorized "such rules and regulations" as "will ensure the objects of such reservations, namely to regulate their occupancy and use and to preserve the forests thereon from destruction." 30 Stat. at 35.

B. The United States' proprietary regulation of the Bighorn National Forest demonstrates its occupation of the land.

Wyoming does not dispute that the United States, in its proprietary capacity, has "plenary power" to decide who hunts on its land. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987). It has done so here, and Herrera's actions violated the restrictions on hunting imposed by the United States as landowner. The United States itself regulates hunting in the national forests, and Herrera's actions violated these commands.

Since 1941, the United States has banned hunting in a national forest without a permit from the Forest Supervisor. 36 C.F.R. § 241.3(b). The same rule directs the Forest Service to enter into cooperative agreements with states for wildlife management (*i.e.*, hunting). 36 C.F.R. § 241.2; Master Memorandum of Agreement between the Forest Service and Wyoming Game and Fish Commission, *Repsis* App., Vol. I at 248-60. (cooperative agreement for Wyoming to manage

wildlife in the national forests and containing no reference whatsoever to tribal hunting rights).

Other federal restrictions on hunting in the national forests date back even earlier. In the first appropriation to implement the Organic Act, Congress ordered that federal employees "shall in all ways that are practicable, aid in the enforcement of the laws of the State or Territory in which said forest reservation is situated, in relation to the protection of fish and game[.]" Appropriations Act of 1899, ch. 424, 30 Stat. 1074, 1095 (1899); *see United States v. New Mexico*, 438 U.S. 696, 722 (1978) (discussing history); 16 U.S.C. § 553.

In its brief, the United States identifies another regulation that limits tribal hunting: the prohibition against discharging firearms near a residence. The United States does not, however, explain why that regulation applies to Herrera, while the prohibition against hunting without a permit does not. (Br. of United States at 28 (citing 36 C.F.R. § 261.10(d)(1))). The explanation cannot be that the regulations have different underlying authority, as both rely on proprietary authority under the Organic Act. Regulations for the Administration and Enforcement of Laws Relating to Wildlife, 6 Fed. Reg. 1987 (Apr. 17, 1941); National Forest System Prohibitions, 42 Fed. Reg. 2956, 2957 (Jan. 14, 1977).

Moreover, neither restriction explicitly references an Indian treaty right, so the different application cannot derive from an unspecified "clear statement"

requirement. The United States' suggestion that one restriction is within its power necessarily implies that the other restriction, which reinforces the illegality of Herrera's conduct, also applies here.

The United States does not need to alter the federal common law of issue preclusion, overcome *stare decisis*, and revive a defunct treaty right to accomplish the result it seeks here. This is federal property, and the United States decides who may enter and what they may do.

C. The Crow Tribe understood the Bighorn National Forest was occupied.

When President Cleveland acted, the Bighorn National Forest looked nothing like the "aboriginal hunting grounds" Herrera invokes. (Pet.Br.10). By the 1890s, the Homestead Act's vision of small farms had given way to the most exploitive, scarring extraction of natural resources the Bighorn Mountains had ever seen. "[G]ame in the Big Horn Basin was practically extinct in 1900[.]" King, *History of Wildlife* at 19. The animals had been killed for food by men living in logging camps and mining camps. By 1899, in the Bighorn National Forest, "[n]early all has been burned, much of it recently, and a large part has been subjected to repeated fires." *Annual Report of the United States Geological Survey for 1898*, Part 5a: Forest Reserves at 168 (1899). "A considerable proportion of its area consists of open parks from which the timber has evidently been completely driven out." *Id.*; *see also id.*

at 186 ("Less than 10 per cent of the area of the reserve bears timber large enough for present use[.]"); *id.* at 179-81 (noting multiple logging mills); *id.* at 181-83 (noting mining claims for gold and copper, and stating, "In these localities and many others every acre for miles around has been staked off in claims."); *id.* at 183-85 (400,000-450,000 head of sheep grazed there).

The Crow Tribe would have understood the Bighorn Mountains were occupied even before President Cleveland's declaration, which removed any doubt.

D. The Forest Reserve Act "savings clause" cited by Herrera is irrelevant.

Herrera notes that the Forest Reserve Act states that Indian treaty rights are not changed, repealed, or modified as a result of the Act. (Pet.Br.39 ("But Congress also made crystal clear that 'nothing in this act shall change, repeal, or modify any . . . treaties made with Indian tribes.'")). The full provision has a different meaning: "nothing in this act shall change, repeal, or modify any agreements or treaties with Indian tribes *for disposal of their lands* . . . and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements[.]" *See* ch. 561, § 10, 26 Stat. at 1099 (1891) (emphasis added). The provision says nothing about treaty hunting rights; it exists because immediately before the savings clause in section 10, the Forest Reserve Act stated "no public lands of the United States, except abandoned military reservations . . . shall be sold at

public sale." ch. 561 § 9, 26 Stat. at 1099. Without the savings clause, the United States could not fulfill existing agreements to sell tribal land, because it still had the legal title.

CONCLUSION

Since *Race Horse*, Wyoming has relied upon this Court's holding; it is Wyoming's responsibility to manage wildlife in trust for all. Wyoming has reintroduced wildlife where there was none, including within the Bighorn National Forest.

The United States suggests the parties return to the lower courts to litigate whether conservation necessity justifies Wyoming's regulation. Wyoming is confident of its wildlife management, but additional costly litigation is not necessary. This Court should preclude Herrera from relitigating the exact treaty provision that his sovereign—the Crow Tribe—litigated and lost. Collateral attacks undermine the expectations of litigants and, more generally, faith in the judicial system.

If this Court nonetheless considers Herrera's new interpretation of Article 4 of the Crow Treaty, it should conclude that the text, the historic context of the treaty, and the post-ratification conduct of the parties all indicate that Article 4 was a temporary measure. Article 4 expired when Wyoming gained statehood and the hunting districts vanished. If this Court concludes that the right persists, then it should hold that

creation of the Bighorn National Forest occupied that land as a matter of law. Herrera's conviction should be affirmed.

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No. 17-532

In the
Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ of Certiorari to the District Court of Wyoming, Sheridan County

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REPLY BRIEF

The 1868 Treaty between the United States and the Crow Tribe provides that the Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." That text does not identify Wyoming's statehood as an event that terminates the hunting right. Likewise, Wyoming's 1890 Statehood Act evinces no congressional intent to terminate the right. And neither law nor logic supports the counterintuitive proposition that the Tribe's hunting grounds ceased to be "unoccupied" simply because President Cleveland in 1897 declared those lands to be the Bighorn National Forest—in a proclamation prohibiting "entry or settlement," no less. In short, as both the United States and the Crow Tribe agree, Petitioner's hunting right survived Wyoming's admission to the Union and the establishment of the Bighorn National Forest.

Wyoming does not—and could not—claim that its statehood was an *express* ground for terminating the treaty right. Instead, Wyoming suggests that statehood marked the culmination of the "march of advancing civilization," which eradicated the Tribe's hunting districts and terminated the right. But Wyoming falls well short of showing that the relevant lands were "occupied" within the meaning of the Treaty; accordingly, its argument is merely a repackaged way of saying that statehood *impliedly* repealed the hunting right. This Court has made absolutely clear, however, that "[t]reaty rights are not impliedly terminated upon statehood." *Minnesota v.*

Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 207 (1999).

As for the creation of the Bighorn National Forest, Wyoming offers no evidence that the Tribe would have understood that its hunting grounds had become "occupied" as the result of a legal decree *prohibiting* settlement. Rather, Wyoming retreats to an array of meritless arguments that, taken individually or collectively, do nothing to demonstrate elimination of the Tribe's treaty right.

Wyoming spends most of its energy pressing an issue preclusion theory that it never raised at Petitioner's criminal trial. But the centerpiece of Wyoming's preclusion argument—a prior determination that Wyoming's statehood terminated the Tribe's hunting right, *see Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1994), *aff'd*, 73 F.3d 982 (10th Cir. 1995)—has been thoroughly undermined by *Mille Lacs*, which changed the legal context governing Indian treaty rights and thus deprives *Repsis* of its preclusive force. Faced with that obstacle, Wyoming first advances an implausible reading of *Mille Lacs* and then misconstrues this Court's cases in an effort to deny the very existence of the changed-legal-context exception to preclusion. The bottom line is that there is no justification—under principles of issue preclusion or otherwise—for affirming Petitioner's conviction and interring a 150-year-old federal treaty right. To the contrary, if the text of Indian treaties means anything, the Court must reverse.

I. The Crow Tribe's Hunting Right Under The 1868 Treaty Has Not Been Terminated.

A. Wyoming's Admission to the Union Did Not Terminate the Treaty Right.

This Court repeatedly emphasized in *Mille Lacs* that Indian treaty rights "are not impliedly terminated upon statehood." 526 U.S. at 207; *see also id.* at 205, 207. That decision forecloses any contention that Wyoming's statehood brought the Tribe's hunting right to an end. The 1868 Treaty "defines the circumstances under which the right[] would terminate," *id.* at 207, and none of those circumstances includes statehood. Nor did Congress "clearly express its intent" to abrogate the hunting right in Wyoming's Statehood Act. *Id.* at 202. Thus, the only way Wyoming's statehood could have abrogated the Tribe's hunting right is by implication, which *Mille Lacs* rejects. Pet.Br.23-26.

Wyoming all but ignores *Mille Lacs* when addressing the merits.[1] For example, citing *Ward v. Race Horse*, 163 U.S. 504 (1896), Wyoming maintains that the hunting right was a "temporary right not intended to survive Wyoming's statehood," Resp.Br.20, and it argues that this Court "should adopt" *Race Horse*'s "conclusion that [the] 'temporary and precarious' off-reservation hunting right has expired," Resp.Br.55. But *Mille Lacs* rejected "the 'temporary and precarious' language in *Race Horse*" as

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[1] As it did in opposing certiorari, Wyoming claims there is insufficient record evidence to address the merits. Resp.Br.3. But as the court below recognized, whether the Tribe's hunting right has terminated is a pure "question[] of law." Pet.App.9; *see* Pet.Cert.Reply.Br.11-12.

"too broad to be useful in distinguishing rights that survive statehood from those that do not." 526 U.S. at 206. Instead, courts should examine the "fixed termination point[s]" in the text that the parties "clearly contemplated" as extinguishing reserved rights. *Id.* at 207. Examining the *Race Horse* treaty—which is materially identical to the Treaty here—*Mille Lacs* explained that the "right[] would continue only so long as the hunting grounds remained unoccupied and owned by the United States." *Id.* *Mille Lacs* did *not* identify Wyoming's statehood as a rights-terminating event when analyzing the *Race Horse* treaty, which is precisely why it declared that reserved treaty rights cannot "be extinguished by *implication* at statehood." *Id.* That emphatic pronouncement would have been completely unnecessary if the *Race Horse* treaty "clearly contemplated" statehood as a rights-terminating event. Consequently, Wyoming's statehood is not a rights-terminating event here.

Wyoming tries to get around this seemingly insurmountable problem by suggesting that its statehood was an indication that the "lands of the United States" were no longer "unoccupied." This cumbersome theory turns on the idea that the reference to "hunting districts" in the 1868 Treaty was meant to encompass "wilderness" that had not experienced the "march of advancing civilization." Resp.Br.43.[2] In Wyoming's view, its grant of statehood in 1890 reflected "congressional recognition" that

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[2] Wyoming borrows this language from *Race Horse*, which elaborated that the "wilderness" where the Indians lived was "destined to be occupied and settled by the white man." 163 U.S. at 508-09.

"civilization [had] arrived," thereby terminating the treaty right. Resp.Br.48.

This novel argument suffers from multiple flaws. To start, the assertions underlying Wyoming's claim of "civilization"—including that the "buffalo were gone," Crow members were prevented from freely leaving their reservation, and the Crow "ceased off-reservation hunting," Resp.Br.47—are dubious, or irrelevant, or both.[3] Furthermore, despite invoking "congressional recognition" that "civilization arrive[s]" upon statehood, Wyoming does not actually identify any such "congressional recognition"—presumably because the notion that territories are lawless dystopias until statehood, but fully mature polities immediately thereafter, is as far-fetched as it sounds.

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[3] For one, Wyoming disregards that the Crow hunted other game besides buffalo. *See* Resp.Br.7; Pet.Br.7. For another, the supposed "deposition testimony ... that the Tribe stopped all off-reservation hunting by 1886," Resp.Br.9, is actually one page in a brief and a "chronological listing of Crow tribal events" asserting (without support) that "year-round" off-reservation hunting ended in 1886, not that *all* off-reservation hunting ended. *See* J.A.376, 387, 476, 485, *Repsis*, No. 94-8097 (10th Cir. Feb. 14, 1995). Indeed, Wyoming argues that Crow Tribe members were prosecuted for "poaching" *after* 1886, indicating that off-reservation hunting continued. Resp.Br.9-10; *see* Pet.Br.10 n.6 (noting 1972 prosecution). Moreover, given that Tribe members "could be jailed" for leaving the reservation, Resp.Br.10, and white settlers literally got away with "murder[ing]" off-reservation Tribe members, Frederick E. Hoxie, *Parading Through History: The Making of the Crow Nation in America 1805-1935* 113 (1995), it is unsurprising that the Tribe might have reduced off-reservation hunting during that period. Hostility toward the Tribe, however—official or private—does not diminish the treaty right.

Additionally, as Wyoming seemingly acknowledges, its theory requires ascribing to the Tribe the belief that "occupied" lands within the meaning of the 1868 Treaty included lands without any "physical presence." Resp.Br.49-53. But the overwhelming textual and historical evidence demonstrates that the Tribe and the United States understood the distinction between "unoccupied" and "occupied" lands to be a common-sense one turning on the actual, physical presence of non-Indian settlers. Pet.Br.33-36.

Wyoming barely addresses this evidence. Instead, it contends that because the Treaty "'set apart'" approximately eight million acres for the Tribe's "'undisturbed use and occupation,'" and the Tribe "did not live everywhere" on those eight million acres, the Tribe must have understood the term "occupation" to mean merely "the right to prevent entry and settlement by others." Resp.Br.49-50, 57. That argument simply misreads the text. The Treaty does not say that the Tribe would be "occup[ying]" eight million acres; it says eight million acres are *reserved* for the Tribe to "occup[y]" (*i.e.*, to settle upon)—just as those eight million acres are reserved for the Tribe to "use." 15 Stat. 649, 650 (1868). Indeed, if the Treaty parties considered "occupation" to mean the "power to exclude," Resp.Br.50, then since the United States always possessed that power, the hunting grounds were "occupied" even in 1868, rendering the treaty right a nullity from the outset. Regardless, even if the Treaty were ambiguous on this point, it must be construed in the Tribe's favor—one of the many Indian canons of construction that Wyoming ignores. Pet.Br.22-23.

Absent a showing of actual occupation as the Treaty parties would have understood that term, Wyoming is left with the proposition that the mere fact of statehood *itself* can constitute occupation for purposes of the Treaty. It thus argues that the hunting right terminated because the lands comprising the hunting districts "came 'within the authority and jurisdiction of a State.'" Resp.Br.48; *see also* Resp.Br.62 (contending that the right "expired when Wyoming gained statehood and the hunting districts vanished"). But that argument—like Wyoming's prior arguments based upon its statehood—runs headlong into the general prohibition against termination of treaty rights by implication and the more specific recognition that treaty hunting rights are not inconsistent with state sovereignty over natural resources. *See Mille Lacs*, 526 U.S. at 207-08. Wyoming cannot get around those principles by singling out an express condition for termination in the Treaty—here, occupation of the lands of the United States—and then insisting that the Court *infer* satisfaction of that condition on the basis of statehood alone. Because there is no suggestion in the 1868 Treaty or Wyoming Statehood Act that the hunting right would terminate when a state was established, the "authority and jurisdiction of a State" could only have terminated the treaty right "by *implication*," which *Mille Lacs* squarely repudiates. *Id.* at 207.

B. The Establishment of the Bighorn National Forest Did Not Terminate the Treaty Right.

Wyoming devotes a mere fraction of its brief to defending the proposition that the 1897 creation of the Bighorn National Forest rendered that land "occupied." For good reason. There is no dispute that the "unoccupied lands of the United States" described in the 1868 Treaty included the lands later comprising the Bighorn National Forest and that those lands were "unoccupied" in 1868. Pet.Br.34. President Cleveland's 1897 proclamation establishing the forest expressly *prohibited* "entry or settlement" on the lands—indeed, "warn[ed] ... all persons not to enter or make settlement upon the ... land." 29 Stat. 909, 909-10 (Feb. 22, 1897). Given the significant evidence that the Tribe and the United States understood "occupied" lands to be those actually settled by non-Indians, it strains credulity to conclude that a legal decree barring entry or settlement on the relevant lands could have terminated the Tribe's right to hunt there—as both Treaty parties have observed. U.S.Br.25; Crow.Br.17.[4]

Wyoming's responses are uniformly meritless. First, Wyoming contends that the federal government can "occupy" land "through its exercise of dominion and control." Resp.Br.56. Wyoming never actually provides a rationale for this *ipse dixit*, however. Wyoming merely argues that President Cleveland's proclamation establishing the forest removed the

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[4] Several of Wyoming's *amici* proceed on the assumption that the Court will *reject* Wyoming's arguments. *E.g.*, WSGA.Br.i.

lands "from the public domain." Resp.Br.55. But it does not follow that land removed from the public domain becomes "occupied," which is what Wyoming must establish. That is particularly so when the act removing the land from the public domain *prohibits* use or settlement of that land. Furthermore, Wyoming nowhere demonstrates that the parties to the 1868 Treaty understood "occupied" land to mean land over which the United States had merely "exercise[d] ... dominion and control."[5] If they had, then there would have been no treaty right from the start, since in 1868 the United States readily exercised its "dominion and control" over that same land by forcing Crow members out but guaranteeing them the right to hunt there.[6]

Second, Wyoming contends that this Court should affirm Petitioner's *state*-law conviction because his actions purportedly violated *federal* regulations promulgated *after* the creation of the Bighorn

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[5] The most Wyoming musters is that "[t]ribal leaders had visited military outposts in 1867," so they "understood that a governmental unit could 'occupy' lands." Resp.Br.57. But it is highly unlikely that those "military outposts" were devoid of military personnel or other signs of actual, physical occupation.

[6] Wyoming argues that the 1872 creation of Yellowstone National Park "immediately ... forb[ade] hunting in a large portion of" the Wyoming territory. Resp.Br.50-51, 57. In fact, the statute creating Yellowstone only barred hunting "for merchandise or profit." Act of Mar. 1, 1872, 17 Stat. 32, 33. Subsistence hunting was not prohibited until 1894. *See* Act of May 7, 1894, 28 Stat. 73, 73-74 ("all hunting ... is prohibited"). Regardless, as these statutes demonstrate, tribal hunting on those lands ended not because Yellowstone's creation suddenly rendered them "occupied," but because Congress exercised its power to enact legislation abrogating a treaty right.

National Forest, including regulations from 1941. *See* Resp.Br.58-59; *cf.* AFWA.Br.16-18. But such regulations have no relevance to the forest's creation, and the United States—which supports reversal—has never suggested that Petitioner has violated them.[7]

Third, Wyoming contends that "[t]he Crow Tribe would have understood the Bighorn Mountains were occupied even *before* President Cleveland's declaration" in 1897. Resp.Br.60-61 (emphasis added). Wyoming makes no attempt to provide a meaning of "occupied" supporting this assertion. To the extent it means to suggest that the land was "occupied" because of the supposedly "exploitive, scarring extraction of natural resources," Resp.Br.60, Wyoming's own sources undermine this claim.[8] Regardless, Wyoming's felt need to focus on *pre*-1897

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[7] Wyoming faults the United States for "not ... explain[ing]" why a federal regulation prohibiting the discharge of firearms "within 150 yards" of "occupied area[s]" applies to Petitioner. Resp.Br.59; 36 C.F.R. §261.10(d)(1). Wyoming misses the point, which is that federal regulations recognize that only *certain* areas within a national forest may be "occupied"—not that the *entire* forest is "occupied."

[8] According to Wyoming's principal source, there was actually "very little" settlement of the land. *Annual Report of the United States Geological Survey for 1898*, Part 5a: Forest Reserves at 167, https://on.doi.gov/2PXcmfl. There had "been no 'mining boom,'" and only six sawmills "on or near" the forest were in operation, largely because the area was only "lightly forested" given "repeated fires" set not by white settlers, but by Indians "for the purpose of driving out game" to hunt. *Id.* at 168, 179, 181. Relatedly, Wyoming asserts that "[g]ame in the Big Horn Basin was practically extinct in 1900." Resp.Br.10, 60. But the Bighorn Basin is a separate region from the Bighorn National Forest. *See Geological Survey* at 166.

activities only underscores its inability to defend the decision below and explain why the creation of the Bighorn National Forest, in and of itself, rendered the land "occupied."

Finally, responding to Petitioner's argument that President Cleveland could not have terminated the right because the authorizing Forest Reserve Act disclaimed any intent to "change, repeal, or modify any ... treaties made with any Indian tribes for the disposal of their lands," 26 Stat. 1095, 1099 (1891); Pet.38-39, Wyoming asserts that this provision is "irrelevant" because it "says nothing about treaty hunting rights," Resp.Br.61. But the 1868 Treaty was all about "dispos[ing] of" the Tribe's lands, and a core component of that arrangement concerned the Tribe's continuing right to hunt on those lands. To interpret the 1897 proclamation issued pursuant to the Forest Reserve Act as an act of "occupation"—and thus a rights-terminating event—would plainly "change, repeal, or modify" the hunting right provided for in the Treaty.

C. Affirmance Would Have Far-Reaching Consequences.

Wyoming barely disputes the far-reaching implications for Petitioner and other Indians of upholding the decision below and the minimal burden on it of reversal. For example, as the Crow Tribe attests, it has exercised its hunting right "[s]ince the execution of the 1868 Treaty," and that right is "fundamental to the survival and well-being of the Tribe and its citizens." Crow.Br.12-13, 31. Moreover, the Tribe's ability to exercise that right is especially important since the Bighorn National Forest

constitutes the Tribe's "sacred hunting grounds." McCleary.Br.11-12. Wyoming never addresses these concerns except to imply there would be no impact because the Tribe purportedly "stopped all off-reservation hunting by 1886." Resp.Br.9. But as explained, *see* n.3, *supra*, and as the Crow Tribe's brief underscores, that notion is simply mistaken.[9]

Wyoming likewise fails to acknowledge the nearly twenty other tribes whose rights would be threatened by affirmance. Pet.Br.41-44. Pursuant to treaties containing language substantially similar (if not identical) to that found in the 1868 Treaty, those tribes also exercise off-reservation rights that are "central" to their "subsistence, economy, culture, spiritual life, and day-to-day existence." Pac.Inland.Nw.Tribes.Br.3. Thus, if Wyoming's admission to the Union—or the "march of advancing civilization"—can terminate the Crow Tribe's hunting right despite no legal text dictating that result, or if the mere creation of the Bighorn National Forest can "occupy" that land and thus terminate the Tribe's treaty right, there is no principled reason why other tribes' off-reservation rights would have survived similar events. Pet.Br.43-44.

Wyoming implies that these broader consequences are overblown because "only two" treaties "have the identical language presented

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[9] As in its brief opposing certiorari, Wyoming attempts to malign Petitioner's motives, falsely insinuating that he hunted for "trophy" kills rather than food. Resp.Br.18 n.3. That position contradicts the decision below, Wyoming's own trial exhibits, and the testimony of the officer who investigated Petitioner. *See, e.g.*, Pet.App.5; JA170; JA256; Pet.Cert.Reply.Br.7 n.1.

here"—*i.e.*, "unoccupied lands"—while others use language like "open and unclaimed lands." Resp.Br.2 & n.1. But as several state supreme courts have concluded, treaty language like "open and unclaimed lands" is essentially synonymous with "unoccupied lands," in part because that is what those treaties' negotiators intended. *See, e.g.*, *State v. Buchanan*, 978 P.2d 1070, 1082 (Wash. 1999) (defining "open and unclaimed" lands as "publicly-owned lands, which are not obviously occupied"); *State v. Stasso*, 563 P.2d 562, 565 (Mont. 1977) (defining "open and unclaimed" lands to include lands "not settled and occupied"); *State v. Arthur*, 261 P.2d 135, 141 (Idaho 1953) (explaining that negotiators promised Indians they could hunt on "lands not occupied by settlers"); *see also Confederated Tribes of Umatilla Indian Reservation v. Maison*, 262 F. Supp. 871, 873 (D. Or. 1966). Affirmance would thus adversely affect tribes across the American West.

Against all of this, Wyoming concedes that even if the Court reverses, it will retain authority to enforce its game laws under the well-established "conservation necessity" standard. *See* Resp.Br.62.[10] That acknowledgment defeats the exaggerations by Wyoming's *amici* that reversal would "instantly curtail[]" states' "authority to regulate" wildlife, AFWA.Br.3, "facilitate unregulated take" of species, Safari.Br.7, or "overturn the delicate balance" governing wildlife regulation, WAFWA.Br.3. To the

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[10] Wyoming does not dispute that the "conservation necessity" issue is not before this Court. Pet.Br.17 n.10. Arguments regarding that issue are therefore irrelevant. *See* WAFWA.Br.15-20; Safari.Br.11-21.

contrary, reversal would simply bring Wyoming back in line with other states that have readily balanced court-recognized Indian treaty rights with conservation management. *See* Pet.Br.43 n.13; Ute.Br.18 (noting that "agreements between the *amici* and the State of Colorado have fostered relationships that serve the conservation and management interests of both the Ute Tribes and the State").

II. Issue Preclusion Does Not Bar Petitioner From Addressing The Treaty Right's Validity.

A. The Determination that Wyoming's Statehood Terminated the Treaty Right Is Not Entitled to Preclusive Effect.

As it did in opposing certiorari, Wyoming places most of its chips not on a defense of the merits, but on the issue preclusion doctrine introduced *sua sponte* by the court below. But issue preclusion does not bar relitigation of an issue when there has been "a change in the applicable legal context." *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (brackets omitted). That principle squarely forecloses Wyoming's attempt to invoke preclusion on the basis of the determination in *Repsis* that its statehood terminated the Tribe's hunting right.

The change in legal context from *Repsis* to *Mille Lacs* could hardly be clearer. In 1896, this Court in *Race Horse* had concluded that Wyoming's statehood impliedly terminated the Bannock Tribe's treaty rights. 163 U.S. at 514; *see Mille Lacs*, 526 U.S. at 207 (*Race Horse* held "that Indian treaty rights were impliedly repealed by Wyoming's statehood Act"). A century later, *Repsis* relied exclusively on *Race Horse*

to declare that materially identical language in the 1868 Treaty reserving the Crow Tribe's hunting right was impliedly "repealed by the act admitting Wyoming into the Union." 73 F.3d at 992. But just four years after *Repsis*, this Court in *Mille Lacs* expressly repudiated the doctrine of termination by implication, holding unequivocally that Indian "[t]reaty rights are not impliedly terminated upon statehood." 526 U.S. at 207.

The Court's rejection of termination by implication was not the only change from *Repsis* to *Mille Lacs*. In holding that the 1868 Treaty "reserved a temporary right ... repealed with Wyoming's admission into the Union," *Repsis* relied on *Race Horse*'s "conclu[sion] that the right conferred by" the Bannock treaty "was 'temporary and precarious.'" 73 F.3d at 991, 994. But *Mille Lacs* rejected the "temporary and precarious" framework as "too broad to be useful in distinguishing rights that survive statehood from those that do not." 526 U.S. at 206. It instructed courts to look instead to the treaty language itself to determine the specific conditions under which treaty rights expire. *Id.* at 206-07; pp.3-4, *supra*.

If the foregoing does not constitute a "change in the applicable legal context," it is hard to imagine what does. Even if *Race Horse* was not "expressly overruled" in *Mille Lacs*, *but cf.* Pet.Br.30, "the latter case strongly implies that the foundation of the former ha[s] been seriously undermined," *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 359 (1984). *Mille Lacs* unquestionably "changed the focus" of Indian treaty interpretation from the approach taken in *Race Horse*

and *Repsis*, which is sufficient to warrant an exception to issue preclusion. *Id.* To conclude otherwise would allow an "early decision based upon ... now repudiated legal doctrine[s]" to "forever" control the Tribe's treaty right. *Id.* at 363.[11]

While conceding that *Mille Lacs* jettisoned the "equal footing" doctrine that "informed" the decision in *Race Horse*, Resp.Br.26; *Mille Lacs*, 526 U.S. at 207-08, Wyoming contends that *Mille Lacs* "expressly approved" the "alternative holding" of *Race Horse*, *i.e.*, that "[t]he treaty rights at issue were not intended to survive Wyoming's statehood," 526 U.S. at 206; Resp.Br.27-29. That argument depends on a patent misreading of *Mille Lacs*. As noted, in addressing that "alternative holding," the Court expressly disavowed the "temporary and precarious" doctrine—on which *Repsis* heavily relied, *see* 73 F.3d at 991-92, 994—a change that, by itself, demonstrates disapproval of *Race Horse*'s "alternative holding." But *Mille Lacs* squarely rejected a second premise of the "alternative holding" as well: that treaty rights "can be extinguished by *implication* at statehood." 526 U.S. at 207. Having flatly stated that "[t]reaty rights are not impliedly terminated upon statehood," *id.*, the Court then dispensed with "the *Race Horse* Court's decision to the contrary" because *Race Horse* had proceeded on a mistaken belief "that the Indian treaty rights were inconsistent with state sovereignty over natural

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[11] In seeking certiorari in *Mille Lacs*, Minnesota argued that the Eighth Circuit's decision was "squarely in conflict with" *Race Horse* and *Repsis*. Pet. for Writ of Cert. 15, 1998 WL 34081059 (U.S. Feb. 17, 1998). This Court, of course, ultimately affirmed the Eighth Circuit's decision.

resources." *Id.* at 207-08. Nothing in this highly critical analysis even comes close to supporting Wyoming's repeated claims that the Court in *Mille Lacs* "re-affirmed" or "expressly approved of" or "endors[ed]" the alternative holding in *Race Horse*. Resp.Br.27-28.

Wyoming next makes the surprising argument that the change-in-applicable-legal-context exception to preclusion simply does not exist. Resp.Br.30-34; *see also* States.Br.8-13. That assertion contradicts decades of this Court's jurisprudence. In *Bobby*, the Court clearly stated: "[E]ven where the core requirements of issue preclusion are met, an exception to the general rule may apply when a change in the applicable legal context intervenes." 556 U.S. at 834 (brackets and quotation marks omitted); *see also, e.g.*, *Limbach*, 466 U.S. at 359 (no issue preclusion where intervening decision adopted "a different approach" to same issue); *Comm'r v. Sunnen*, 333 U.S. 591, 599 (1948) (no issue preclusion given "a change or development in the controlling legal principles"). It could hardly be otherwise: A contrary rule would "create vested rights in decisions that have become obsolete or erroneous." *Sunnen*, 333 U.S. at 599.

Wyoming contends that *Bobby* only "brief[ly] reference[d]" the Restatement (Second) of Judgments and did not "rewrite the federal common law of issue preclusion," which purportedly is set forth in *Montana v. United States*, 440 U.S. 147 (1979), and is "more protective of finality" than the Restatement. Resp.Br.30-32. This argument is wrong in several respects. First, *Bobby* did far more than "brief[ly] reference" the Restatement; it articulated *and applied*

the "change in applicable legal context" rule. *See* 556 U.S. at 836-37 (observing that exception "would be warranted" given "intervening" decision constituting "change in law").

Second, Wyoming is confusing two different issue preclusion exceptions, as *Montana* demonstrates. One exception applies whenever there has been a change in the applicable legal context. This is the rule articulated in *Sunnen*, *Limbach*, and *Bobby*, and embodied in Restatement §28(2)(b) and comment *c*. Citing *Sunnen*, *Montana* expressly acknowledged this exception, *see* 440 U.S. at 161-62 (no issue preclusion where "legal context ... has not materially altered"), but found it inapplicable, *id.* *Montana* then proceeded to address an entirely *different* exception—the one Wyoming invokes here—which applies whenever "issues of law arise in successive actions involving unrelated subject matter." *Id.* at 162. That rule, first articulated in *United States v. Moser*, 266 U.S. 236 (1924), is separately embodied in Restatement §28(2)(a) and comment *b*. Petitioner's case admittedly "does not fit this exception," Resp.Br.31, but he has never contended otherwise. The exception applicable here is the common-sense rule recognized as early as *Sunnen* and as recently as *Bobby*: a "change in the applicable legal context" defeats issue preclusion. *See, e.g.*, *Johnson v. Perdue*, 862 F.3d 712, 716 (8th Cir. 2017) (applying rule).

Wyoming's ensuing policy arguments thus fail. It is certainly true that, as a general rule, "preclusion protects against a second try in state court," Resp.Br.33, but it is equally true that there are

exceptions to the general rule.[12] And while lower courts must apply precedent with dubious foundations, *id.*, Wyoming is again mixing doctrines. Whether a lower court must apply precedent is a separate question from whether a party may argue that a decision relying on that precedent lacks preclusive effect given subsequent changes in the law.

B. The Alternative Determination that Creation of the Bighorn National Forest Rendered the Lands "Occupied" Is Not Entitled to Preclusive Effect.

Wyoming has tellingly little to say regarding the purportedly preclusive effect of the Tenth Circuit's "alternative" determination that the creation of the Bighorn National Forest rendered that land "occupied." Understandably so. Wyoming does not dispute that it never raised this argument below or that the decision below did not base its preclusion ruling on that ground. Indeed, the decision below viewed the relevant prior judgment for preclusion purposes as the "judgment" of the "federal district court" in *Repsis*—which, all agree, did not address the "occupation" question at all. Pet.Br.49 & n.15; U.S.Br.23, 30.

Wyoming's actual arguments lack merit. Wyoming contends that the Tribe had a "full and fair

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[12] Wyoming repeatedly cites *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000 (10th Cir. 2015). But *Ute* did not involve a preclusion exception and is thus inapposite. If anything, *Ute* demonstrates that a change in legal context *does* matter: Earlier in that litigation, because of an intervening Supreme Court decision, the Tenth Circuit granted relief to a party previously denied that relief. *See id.* at 1004.

opportunity" to litigate the "occupation" question in *Repsis*. *See* Pet.Br.51-54. Wyoming does not contest that this critical requirement would be unsatisfied if it had failed to argue in the *Repsis* district court that the forest's creation alone rendered the land "occupied." It simply maintains that it made this argument. Resp.Br.36.

Not so. In its opposition to the Tribe's motion for summary judgment—the document Wyoming cites here—Wyoming merely asserted, in one sentence, that although the land was unoccupied in 1868, "Congress passed numerous acts establishing and regulating federal lands including the Big Horn National Forest." Response Br. for Defs. 8, *Repsis* (D. Wyo. Dec. 21, 1992) (Dkt.54). That is, Wyoming's argument—like its argument in its motion for summary judgment, *see* Pet.Br.52—was that *over time*, the Bighorn National Forest gradually became "occupied" by a series of laws passed by Congress, not that President Cleveland's proclamation (unmentioned in Wyoming's summary judgment arguments) rendered the land completely occupied. Even more significant, in opposing summary judgment, Wyoming argued that "[w]hether or not these lands are or are not occupied *is a factual determination* to be made by the court." Response Br. 8 (emphasis added). That assertion is irreconcilable with an argument that the forest's establishment alone rendered the entire land "occupied" as a matter of law. It confirms that the Tribe did not have a "full and fair opportunity" to litigate that question, foreclosing preclusion.

Wyoming next contends that another exception to issue preclusion—comment *i* to Restatement §27,

which denies preclusive effect "if a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result"—does not apply to the Tenth Circuit's "occupation" determination. Resp.Br.37. Its only argument, however, is that *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924), adopted the opposite position when it observed that "where there are two grounds ... each is the judgment of the court, and of equal validity with the other." *Id.* at 486.

The supposed conflict between *Title Insurance* and the Restatement is wholly imaginary. Section 27, comment *i* does not quarrel with the principle that either of two grounds can constitute an independent basis for a judgment. To the contrary, Section 27, comment *i* takes that principle as a given and, having done so, then goes on to explain why neither of the independent grounds should have preclusive effect in subsequent litigation between the parties. Nothing in *Title Insurance*—which was concerned with the difference between binding rulings and *dicta*—even speaks to that latter issue, let alone purports to resolve it in a way that is "opposite" to the Restatement rule.

Apart from its misplaced reliance on *Title Insurance*, Wyoming has little to say about the Restatement rule, refuting neither the sound policy supporting it nor its applicability here.[13] In particular,

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[13] If anything, Wyoming suggests that the "occupied" determination was not even an independent basis for the Tenth Circuit's judgment, describing it as merely an "additional rationale[]." Resp.Br.15.

Wyoming does not dispute that the Tenth Circuit was acting in the "first instance" when addressing the "occupation" question or that its decision was not upheld on—or even subject to—plenary appellate review, which is a "key factor" in applying preclusion. *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016); *see also id.* (appellate review provides "confidence" that alternative determination below "was substantially correct"); 18 Wright & Miller, *Federal Practice & Procedure* §4421 (3d ed.) (because appellate review provides "reassurances as to quality," preclusion "should be denied to findings that could not be tested by" appellate review); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 395 (5th Cir. 1998) (observing that the "availability of review is of paramount importance to the issue of preclusion"); Pet.Br.51 n.17.[14] These are precisely the

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[14] *Amici* States observe that the Tribe petitioned for certiorari following the Tenth Circuit's decision. States.Br.17. But a petition seeking this Court's discretionary review is not equivalent to plenary appellate review as of right. *Cf. Teague v. Lane*, 489 U.S. 288, 1067 (1989). The States' contention that "at least six circuits" have rejected the Restatement is wildly inaccurate. The cited Seventh, Ninth, Eleventh, and D.C. Circuit decisions do not even mention the Restatement (indeed, the Ninth Circuit decision *predates* the Restatement). In fact, seven circuits have approvingly cited the Restatement's rule. *See Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1297 n.1 (10th Cir. 2014); *SFM Holdings, Ltd. v. Banc of Am. Secs., LLC*, 764 F.3d 1327, 1338 (11th Cir. 2014); *Postlewaite v. McGraw-Hill*, 333 F.3d 42, 50-51 (2d Cir. 2003); *Winters*, 149 F.3d at 392-96; *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008 (7th Cir. 1997) (*en banc*); *Comair Rotron, Inc. v. Nippon Densan Corp.*, 49 F.3d 1535, 1538-39 (Fed. Cir. 1995); *Ritter v. Mount St. Mary's Coll.*, 814 F.2d 986, 993 (4th Cir. 1987).

circumstances, therefore, in which the Restatement rule should apply.

Finally, Wyoming contends that it is the "judgment" that matters, not "the court's opinion explaining the judgment." Resp.Br.37. Wyoming overreads the cited treatise, which merely explains that summary affirmances can occasionally have preclusive effect. But even crediting that assertion, and even assuming that the Tenth Circuit provided the relevant "judgment," *but see* p.19, *supra*, Wyoming's position does not improve. The Tenth Circuit's "judgment" was that the Tribe's treaty right is no longer valid. The legal context underlying that judgment, however, unquestionably changed when *Mille Lacs* altered the relevant law governing Indian treaty interpretation, confirming once again that preclusion does not apply.

C. Applying Issue Preclusion Would Needlessly Implicate Unsettled Constitutional Questions.

Wyoming does not dispute that this Court ordinarily "avoid[s] the unnecessary resolution of constitutional questions." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009). Nor does it contest that to apply issue preclusion here, the Court would have to resolve two questions with constitutional implications—first, whether an Indian is in "privity" with his tribe for issue preclusion purposes; and second, whether a state can apply offensive preclusion against a criminal defendant using a prior civil judgment. Pet.Br.54-57. Wyoming simply asks this Court to decide those questions in its

favor. Its truncated arguments, however, only confirm the wisdom of avoidance here.

For example, Wyoming has no response to this Court's cases questioning if not rejecting offensive issue preclusion against criminal defendants. *See Simpson v. Florida*, 403 U.S. 384 (1971); *Currier v. Virginia*, 138 S. Ct. 2144, 2152 (2018) (plurality op.). And Wyoming identifies no decision—ever—permitting offensive issue preclusion against a criminal defendant based on a prior *civil* judgment (and after the state failed to raise preclusion during the criminal trial, no less). Furthermore, Wyoming's argument turns on state law, Resp.Br.35, suggesting that any rule this Court might articulate would vary across multiple jurisdictions, generating confusion and uncertainty. Similarly, Wyoming identifies no federal case holding that an Indian is in privity with his tribe for preclusion purposes. Wyoming insists that, categorically, tribal members are bound by judgments involving "sovereign" tribes, Resp.Br.24-25, but that sweeping assertion is inconsistent with this Court's admonition that nonparties may be bound by prior judgments only in "limited circumstances," *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008).

At bottom, these far-reaching issues are best resolved in another case—at a minimum, one where preclusion was argued from the outset. They provide no basis for affirming the conviction of a man who exercised a federal treaty right in order to feed his three daughters, and for declaring that 150-year-old treaty right gone forever.

CONCLUSION

The Court should reverse the judgment of the Wyoming District Court.

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December 13, 2018

No. 17-532

In the Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Petition for Writ of Certiorari to the District Court of Wyoming, Sheridan County

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SUPPLEMENTAL BRIEF FOR PETITIONER

The United States correctly observes that the decision below is incorrect, that the question presented has generated conflicts in the lower courts, and that this case is a suitable vehicle for resolving the question presented. Particularly in light of the federal government's "special relationship" with Indian tribes, *Morton v. Mancari*, 417 U.S. 535, 552 (1974), this Court should heed the government's well-informed, unambiguous view that the petition should be granted.

The state proffers three arguments in a last-ditch effort to avoid review. None should give this Court any pause.

First, repeating an assertion from its brief in opposition, *see* Opp.11, 18, 22, 24-25, the state contends that certiorari is unwarranted because, even if the Crow Tribe possesses hunting rights under the 1868 Treaty, Wyoming's hunting regulations as applied to the Tribe are justified by "conservation necessity." *See* Supp.Br.2-6. The state argues that this case is a poor vehicle to address the question presented because the trial court ruled against Petitioner on that "independent, alternative ground" for sustaining his conviction. *Id.*

As Petitioner and the United States have explained, this argument plainly lacks merit. *See* Reply.12 n.5; US.Br.21. Petitioner appealed the trial court's misguided "conservation necessity" ruling to the district court. That court did not reach the issue, however, because it held that the Tribe categorically has *no* treaty hunting rights. Indeed, the court specifically stated that it was "unnecessary to address

the conservation necessity issue" because "the treaty rights do not exist." Pet.App.14 n.3. As the United States notes, should this Court grant review and hold that the Tribe's hunting rights have not been categorically abrogated, the district court can, on remand, address whether the state can meet the "demanding 'conservation necessity' standard." US.Br.21.[1]

For the first time before this Court (or any court), the state makes the entirely new argument that Petitioner "has abandoned his appeal" of the trial court's conservation-necessity ruling. Supp.Br.4. This assertion is mystifying, and wrong. The state *concedes* that Petitioner appealed that ruling to the district court. *Id.* And while Petitioner did not subsequently raise the issue on discretionary review before the Wyoming Supreme Court or this Court, that is quite obviously because the district court *declined to address it*, ruling instead that Wyoming's admission to the Union and the creation of the Bighorn National Forest categorically abrogated the Tribe's hunting rights. Petitioner presented *those* "purely legal" issues both to the Wyoming Supreme Court and to this Court, US.Br.21, and there is no obstacle to reviewing them. As noted, should this Court grant review and reverse, Petitioner's preserved challenged to the trial court's flawed conservation-necessity ruling will be squarely teed up before the district court.

---

[1] The state deems "profoundly misleading" the government's observation that the Wyoming District Court "'did not address'" the conservation-necessity issue. Supp.Br.2. That assertion is profoundly puzzling given that the district court *expressly stated* that it was "unnecessary to address" the issue. Pet.App.14 n.3.

Second, the state claims that review would "disturb expectations of finality" because a decision by this Court in Petitioner's favor would abrogate *Crow Tribe v. Repsis*, 73 F.3d 982 (10th Cir. 1995). Supp.Br.6-11. But this Court's decisions frequently abrogate even long-established lower-court precedent. Indeed, in the very case on which the state relies, *Hagen v. Utah*, 510 U.S. 399 (1994), this Court abrogated an *en banc* Tenth Circuit decision addressing reservation boundaries. *Id.* at 408-09, 421-22. The state claims that *Hagen* "undermined finality in Utah for decades," Supp.Br.11, but that assertion is unsupported, inconsistent with the finality that this Court's decisions bring to a dispute, and implausible given that *Hagen* resolved a "direct conflict" between two lower courts, 510 U.S. at 409.

Relatedly, the state once again invokes collateral-estoppel principles, claiming that Petitioner and the United States seek to "reopen" the judgment in *Repsis*. Supp.Br.7, 11. But a decision by this Court that abrogates a lower-court decision does not "reopen" the judgment in that case. And as Petitioner and the United States have thoroughly explained, collateral estoppel "pose[s] no barrier to this Court's review," particularly in light of the "'change in the applicable context'" worked by *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). US.Br.19 (quoting *Bobby v. Bies*, 556 U.S. 825, 834 (2009)); *see id.* at 18-21; Pet.30-33; Reply.8-11.

The state takes issue with the United States' position that this case presents "'purely legal'" issues. Supp.Br.10. But the district court *itself* acknowledged that the issues are "questions of law," and it reviewed

them *de novo*. Pet.App.9. The state suggests that "further development of the record" is necessary, but the only examples it musters are facts that it concedes are "not in dispute," like whether Wyoming has achieved statehood. Supp.Br.10. As the United States correctly notes, while an evidentiary hearing "on other issues" might be appropriate if this Court reverses and remands, "no further development of the record is necessary" for this Court to review "the legal issues presented" in the petition. US.Br.22.

Third, in what is more of a merits argument than a basis for denying review, the state disputes the United States' view that *Mille Lacs* repudiated the reasoning of *Ward v. Race Horse*, 163 U.S. 504 (1896). Supp.Br.12-13. The state claims that *Mille Lacs* did not "overrule *Race Horse*." *Id.* But lower courts disagree, *see, e.g.*, *State v. Buchanan*, 978 P.2d 1070, 1083 (Wash. 1999) (holding that this Court "overruled *Race Horse* in ... *Mille Lacs*"), and in all events, the United States recommends certiorari in part "to resolve disagreement" over "the continuing effect and scope of *Race Horse*," US.Br.15. The state has never refuted that lower-court conflict or any of the other lower-court conflicts this case implicates. *See* Pet.24-27; Reply.5-7. And as the United States attests, *see* US.Br.15-18, the divide among the lower courts only confirms the need for review of this "important" case, *id.* at 8.

CONCLUSION

The Court should grant the petition.

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No. 17-532

In The Supreme Court of the United States

CLAYVIN HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Wyoming, Sheridan County

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INTRODUCTION

The United States urges this Court to grant certiorari to review two questions it describes as purely legal. (U.S. Br. at 21). The views of the United States notwithstanding, this Court should deny the Petition.

First, the procedural history of this case prevents a decision on the two questions presented by the United States from affecting Clayvin Herrera's criminal conviction.

Second, if this Court accepts and reviews the questions presented by the United States, the grant of review itself will disrupt the final judgment issued by a federal district court, and affirmed by the Tenth Circuit, in *Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1994), *aff'd* 73 F.3d 982 (10th Cir. 1995). In so doing, this Court will undermine settled expectations of finality in a manner that is particularly pernicious in Indian law.

Finally, the questions presented by the United States assume that this Court's decision in *Minnesota v. Mille Lacs Band of Chippewa* [526 U.S. 172 (1999)] overruled its earlier decision in *Ward v. Race Horse* [163 U.S. 504 (1896)], but this was not the outcome urged by the United States or adopted by the *Mille Lacs* majority. In *Mille Lacs*, the United States argued that the two cases could be reconciled, and this Court agreed. The meaning of *Mille Lacs* advocated now by the United States does not reflect a "change in controlling law" but rather a change in the United States' arguments to this Court. If the United States

wants this Court to overrule *Ward v. Race Horse*, it should seek a case that does not present the collateral consequences that Court review would engender here.

ARGUMENT

I. This case presents a poor vehicle to answer the questions presented by the United States because the Petitioner has defaulted on an independent, alternative ground sufficient to sustain his conviction.

Even were this Court to conclude that the Crow Tribe's treaty hunting right persists, the State of Wyoming can regulate off-reservation treaty rights "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Dep't of Game v. Puyallup Tribe*, 414 U.S. 44, 45 (1973) (quoting *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 395, 398 (1968)). State conservation regulations must be "reasonable and necessary." *Id.*

The United States argues that this Court need not consider "whether enforcement of Wyoming's hunting laws against petitioner is 'reasonable and necessary for conservation.'" (U.S. Br. at 21). The United States asserts that "[t]he Wyoming district court did not address that issue." *Id.*

This statement is profoundly misleading. In this case, the **trial court** is the Wyoming "Circuit Court" for the Fourth Judicial District which has "original

jurisdiction in all misdemeanor criminal cases." Wyo. Stat. Ann. § 5-9-129. For misdemeanor convictions, the "Wyoming district court" mentioned by the United States acts only to "review the case on the record on appeal." Wyo. Stat. Ann. § 5-9-141.

When the Wyoming circuit court denied the Petitioner's motion to dismiss the charges against him, the judge rejected his argument that the State's regulations are not reasonable and necessary conservation measures. (*See* Pet'r's App. at 39-41). The court held that "[i]t is unreasonable for the defendant to believe or to even argue that he and other members of the Crow Tribe may hunt any game within the [Big Horn National Forest] without restriction." (*Id.* at 40). It noted that "even the Crow Tribe does not allow such unrestricted hunting in that part of the Big Horn Mountains which are within the Crow Reservation." (*Id.*). "If not for the continuing conservation efforts there would be no game to hunt." (*Id.*). The court found that the Crow Tribe has acknowledged the need for off-reservation hunting regulation, but it found "no evidence" that the Tribe provided such regulation itself. (*Id.* at 40 & n.4).

> Conservation is a necessity and the defendant, whether a Crow Tribal member or not, is subject to regulation. A hunter is regulated by the *Crow Tribe Law and Order Code* when hunting in the Big Horn Mountains on the Crow Reservation in Montana. He is likewise subject to Wyoming Game and Fish regulations when hunting in the Big Horn

> Mountains located within the [Big Horn National Forest] in Wyoming.

(*Id.* at 42-43).

Over the course of this litigation, the Petitioner has abandoned his appeal of this ruling. While he did challenge the conservation necessity of the Wyoming regulations in the Wyoming district court on appeal (*see* Sept. 13, 2016 Br. of Appellant at 17, 20-21), this is as far as the issue went. The Wyoming district court affirmed on other grounds. On appeal to the Wyoming Supreme Court, the Petitioner presented five questions in his petition for review, and not one of those issues mentions the circuit court's holding on conservation necessity. (*See* Petition for Writ of Review, *Herrera v. State*, (No. S-17-0129), at 7-8 (May 10, 2017)).

In Wyoming, "it is the responsibility of the appellant to specify clearly defined issues for [the Wyoming Supreme] Court's review." *Ultra Res., Inc. v. McMurry Energy Co.*, 99 P.3d 959, 962 (Wyo. 2004). "Assignments of errors control the scope of an appeal." *Id.*; *see also Amalgamated Food Emps. Union v. Logan Valley Plaza*, 391 U.S. 308, 313 n.6 (1968).

The Petitioner also did not raise the ruling on conservation necessity to this Court. His failure to challenge the trial court's decision that "conservation necessity" justifies Wyoming's hunting regulations makes that holding the law of the case and makes a decision by this Court advisory.

A "fundamental precept of common-law adjudication" is "that an issue once determined by a competent court is conclusive." *Arizona v. California*, 460 U.S. 605, 619 (1983). "[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Pepper v. United States*, 562 U.S. 476, 506 (2011).

Even if the Petitioner were to prevail on the carefully worded questions presented to this Court by the United States, his conviction will stand unless the Wyoming circuit court disregards its prior ruling and grants Herrera a second opportunity to litigate the conservation necessity of Wyoming's hunting regulations.

Admittedly, the law of the case doctrine "directs a court's discretion" rather than imposing a mandatory "limit [on] the tribunal's power." *Id.* A Wyoming court could grant an exception to the law of the case if new evidence is available or the issue was not actually decided, but, in Wyoming, "[o]rdinarily, the law of the case doctrine requires a trial court to adhere to its own prior rulings, the rulings of an appellate court, or another judge's rulings in the case or a closely related case." *Lieberman v. Mossbrook*, 208 P.3d 1296, 1305 (Wyo. 2009).

Herrera's decision to abandon his appeal of the Wyoming circuit court's ruling on conservation necessity means that he has placed himself squarely into the routine application of this common procedural rule. The recognized exceptions do not apply, and the

federal nature of his claim does not affect the rule's application. This Court recognizes that a procedural default of this nature "is a question of local law, upon which the decision of the highest court of the State is controlling." *Moss v. Ramey*, 239 U.S. 538, 547 (1916). Any decision by this Court on the underlying treaty right, therefore, would be advisory.

II. This Court's review of the questions presented by the United States will disturb expectations of finality that benefit both Indian Tribes and the States.

States and the Indian Tribes have litigated in federal court throughout the history of this nation. The federal courts have already granted final judgment in favor of Wyoming and against the Crow Tribe on the very questions presented by the United States. A grant of certiorari by this Court, regardless of which party prevails on the merits, sends the signal to states and tribes that they need not accept the federal courts' decisions as final.

Federal litigation must present the opportunity for final resolution of a grievance. "[T]hat's why people bring their disputes to court in the first place: because the legal system promises to resolve their differences without resort to violence and supply 'peace and repose' at the end of it all." *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1003 (10th Cir. 2015) (Gorsuch, J.) (*Ute VI*).

Nowhere is this finality more important than in disputes between sovereign entities, such as Indian tribes and the States, which exist in perpetuity. The procedural history surrounding *Hagen v. Utah*, 510 U.S. 399 (1994), demonstrates why this is so.

In *Hagen*, this Court agreed to review a reservation boundary dispute that had already been determined by a final decision of the en banc Tenth Circuit. 510 U.S. at 408-09. Although the Court identified the preliminary question whether Utah should be "collaterally estopped" from relitigating the reservation boundaries, the Court declined to address the procedural bar because the tribal member not only "failed to raise" the argument but "also expressly refused to rely upon it in seeking a writ of certiorari." *Id.* at 410.

As the United States itself recognized, however, if left unchecked, the "gambit to avoid the binding effect of litigation in the federal courts by attempting to relitigate in state court potentially has far-reaching consequences for the finality and integrity of decisions in the federal courts." Memorandum of the United States as Amicus Curiae Supporting Petitioner's Motion for Injunctive Relief, *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 1992 U.S. Dist. Ct. Motions LEXIS 18 at *6 (D. Utah 1992); *see also Ute Indian Tribe of the Uintah & Ouray Reservation v. Myton*, 835 F.3d 1255, 1257 (10th Cir. 2016) (*Ute VII*).

The United States now seeks to reopen a case that is procedurally identical to *Hagen*, with two wrinkles:

(1) it is the Tribe seeking to undo the final judgment in a prior case it lost, not the State of Wyoming; and (2) Wyoming has raised the procedural bar of collateral estoppel stemming from the earlier final decision in *Repsis* on the very tribal hunting right that the Petitioner and the United States claims is the issue here.

In *Crow Tribe v. Repsis*, both the State of Wyoming and the Crow Tribe of Indians—two sovereigns—submitted their dispute over the very hunting regulations at issue in this case to the courts of the United States. The federal courts provided a final answer: the Crow Tribe's suit for a declaratory judgment that the tribe had a hunting right in Wyoming was denied and the suit dismissed by the federal district court with prejudice. Oct. 24, 1994 Order Granting Defendants' Motion for Summary Judgment and Dismissing Complaint, *Crow Tribe v. Repsis*, No. 92-cv-1002, Doc. 60. *See also* Complaint, *Repsis*, J.A. Vol. I at 6 (seeking judgment declaring Crow Tribe retains its "treaty-reserved off-reservation hunting and fishing rights" and an injunction prohibiting interference by Wyoming officials).

The Tenth Circuit affirmed the district court's judgment on the grounds that Article IV of the Treaty with the Crows expired when Wyoming became a state, *Crow Tribe v. Repsis*, 73 F.3d 982, 989-93 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996). But this was not the only Tenth Circuit holding that supported the district court's final judgment.

The Tenth Circuit also held that the Bighorn National Forest is occupied, and, as a result, even if the Crow treaty right persists, it cannot be exercised there. *Id.* at 993. Finally, the Tenth Circuit concluded that if the Crow Tribe's treaty hunting right persists, Wyoming can regulate off-reservation treaty rights "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Repsis*, 73 F.3d at 992-93 ("[I]f the Treaty with the Crows, 1868, had reserved a continuing right which had survived Wyoming's admission, we hold there is ample evidence in the record to support the State's contention that its regulations were reasonable and necessary for conservation.").

Herrera violated the same conservation statute considered by the *Repsis* court: Herrera took a big game animal without a license, and he did so during a closed season that prohibits all hunting for the purpose of conserving the species. *Compare id.* at 985, *with* (Pet'r's App. at 5). The *Repsis* record included testimony about how closed seasons in winter, spring, and summer are needed for conservation to allow big game species to survive through the Wyoming winter and raise new calves. *See Repsis*, J.A., Vol. I at 265-66 and 271-73.

The United States now argues that the Tenth Circuit's holdings were incorrect, but the case between the Crow Tribe and Wyoming is over. Once adjudicated, the resolution of this dispute between these two parties is final.

To evade the final judgment in *Repsis*, the United States argues that the first rationale has been overruled by this Court *sub silentio* and the Wyoming district court (the appellate court here) did not give preclusive effect to the other two holdings. (U.S. Br. at 20). But as an appellate court, the Wyoming district court did not need to decide the preclusive effect of the other holdings because collateral estoppel precluded relitigation of the primary holding in *Repsis*.

Nor are the United States' questions presented "purely legal" in nature, such that no further development of the record is necessary for this Court to reinterpret the treaty. (U.S. Br. at 21-22). On appeal the state district court properly recognized, "[t]he determination of the validity of the off-reservation treaty right is a mixed question of law and fact." (Pet'r's App. at 24-25). Article IV of the Treaty with the Crows recognizes a conditional right that expires upon the happening of certain events. Whether any or all of those events have occurred is a matter of fact, not law. This is true whether the fact is statehood, occupation, or peace on the borders of the hunting districts. As such, even if the fact at issue is not in dispute, collateral estoppel bars relitigation of the application of that fact to the law set forth in the Treaty.

Since 1995, the Crow Tribe has known that each holding in *Repsis* is an independent basis that sustains the final judgment: the Tribe petitioned for certiorari on all three holdings. (*See* Pet. 7, 22, 24, United States Supreme Court doc. no. 95-1560); *see also, e.g.*, *Cohen's Handbook of Federal Indian Law* § 1804[2][e] at 1172

(Nell Jessup Newton ed. 2012) ("The outcome in *Crow Tribe v. Repsis* is not affected by *Mille Lacs*, because the Tenth Circuit made an alternative holding that the national forest lands in question were not unoccupied lands.").

A decision by this Court to reopen the final judgment in *Repsis* presents a disruption like the one in *Hagen* that has undermined finality in Utah for decades. It is therefore somewhat inexplicable why the United States would ask this Court not only to reinterpret the Crow treaty but to do so without extensive lower court evidence on the intent of the parties, the history of the negotiations, their purpose, the context in which they occurred, and the practical construction adopted by the parties. *See Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979).

The two parties in this case are the State of Wyoming and an individual in privity with the Crow Tribe, who claims a tribal hunting right. The *Repsis* final judgment binds both sovereigns, and it should remain undisturbed. "A system of law that places any value on finality—as any system of law worth its salt must—cannot allow intransigent litigants to challenge settled decisions year after year, decade after decade, until they wear everyone else out." *Ute VI*, 790 F.3d at 1012. A grant of certiorari in this case, regardless of outcome, undermines the finality of judgments.

III. Should this Court grant review, this case presents deeper legal issues than the limited application of *Mille Lacs* urged by the United States.

The United States asserts that *Mille Lacs* repudiated *Race Horse* (U.S. Br. at 19), effectively overruling that earlier decision. But this Court did not so hold. *See, e.g.*, *Cohen's Handbook of Federal Indian Law* § 1807[5] at 1198 (noting that *Mille Lacs* avoided overruling *Race Horse* in its entirety).

The Court in *Mille Lacs* expressly acknowledged the alternative holding of *Race Horse* that Congress did not intend the language "the right to hunt on the unoccupied lands of the United States" to survive Wyoming statehood. 526 U.S. at 206. It distinguished the treaty in *Mille Lacs* on its facts, noting that the rights it guaranteed were "unlike the rights at issue in *Race Horse*[.]" *Id.* at 207. As Justice O'Connor acknowledged just two years before she wrote for the Court in *Mille Lacs*, when this Court decides to overrule prior precedent, it does not do so by implication. "We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

The decision not to overrule *Race Horse* was the outcome sought by the United States using the reasoning that the United States advanced in its brief in *Mille Lacs*. *See* Brief for the United States, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (No. 97-1337), 1998 U.S. S. Ct.

Briefs LEXIS 416, *44-45. The United States did not argue that the Court needed to overrule *Race Horse* to find for the Mille Lacs Tribe.

Now the United States asserts that *Mille Lacs* and *Race Horse* are incompatible. (U.S. Br. at 11-12.) If this is so, then this Court has considerable freedom to reconcile the two opinions. The doctrine of *stare decisis* certainly does not require this Court to overturn a precedent of more than 100 years in favor of another decision less than 20 years old.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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No. 17-532

In the Supreme Court of the United States

CLAYVIN HERRERA, PETITIONER

v.

STATE OF WYOMING

ON WRIT OF CERTIORARI
TO THE DISTRICT COURT OF WYOMING,
SHERIDAN COUNTY

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the Crow Tribe of Indians' right under the Second Treaty of Fort Laramie of 1868 to hunt on "unoccupied lands of the United States" survived Wyoming's admission to the Union.

2. Whether the establishment of a National Forest, in and of itself, renders lands within that forest "[]occupied" under the 1868 Treaty.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the scope and continuing validity of a right reserved to the Crow Tribe of Indians by a treaty between that Tribe and the United States. The United States has a substantial interest in the proper interpretation of its treaties with Indian tribes, in light of both its status as a party to such treaties and its special relationship with the Indian signatories whose rights such treaties secure. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. Three centuries ago, the Crow Tribe of Indians (the Crow or the Tribe) migrated from Canada to what is now southern Montana and northern Wyoming. *Montana* v. *United States*, 450 U.S. 544, 547 (1981); Pet. 4. "In the 19th century, warfare between the Crows and

several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851, in which the signatory tribes acknowledged various designated lands as their respective territories." *Montana*, 450 U.S. at 547-548; see Treaty of Fort Laramie (1851 Treaty), Sept. 17, 1851, 11 Stat. 749; 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 594-595 (1904) (Kappler). The 1851 Treaty "identified approximately 38.5 million acres as Crow territory." *Montana*, 450 U.S. at 548. It also specified that the tribes did "not surrender the privilege of hunting, fishing, or passing over any of the" designated lands. Kappler 595.

By the 1860s, non-Indians were rapidly settling the lands that the 1851 Treaty had identified as Crow territory—laying out roads, taking possession of valuable mines, and scaring away game. Institute for the Development of Indian Law, *Proceedings of the Great Peace Commission of 1867-1868*, at 86-88, 90 (1975) (*Proceedings*). In 1867, representatives of the United States, including the Commissioner of Indian Affairs, approached the Crow with a proposal to "set apart a tract of your country as a home for yourselves and children forever, upon which your great Father will not permit the white man to trespass." *Id.* at 86. As for "the rest" of the Crow's territory, the United States proposed to "buy * * * the right to use and settle [it]," while "leaving to" the Crow "the right to hunt upon it as long as the game lasts." *Ibid.*; see *id.* at 90 ("You will still be free to hunt as you are now.").

The United States and the Tribe subsequently signed the Second Treaty of Fort Laramie of 1868. Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty), May 7, 1868, 15 Stat.

649; see *Montana*, 450 U.S. at 548. That treaty established in present-day Montana "a Crow Reservation of roughly 8 million acres," *Montana*, 450 U.S. at 548, "for the absolute and undisturbed use and occupation of the [Crow]," 1868 Treaty, art. II, 15 Stat. 650. In exchange, the Tribe agreed to cede the rest of its lands, including its lands in present-day Wyoming, to the United States. *Ibid.* The 1868 Treaty expressly provided, however, that the Tribe would retain certain rights in those ceded lands. In particular, Article IV specified that the Crow "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 15 Stat. 650.

2. Two months after the 1868 Treaty was signed, Congress passed a statute creating a temporary government for the Territory of Wyoming. Act of July 25, 1868 (1868 Act), ch. 235, 15 Stat. 178. That statute provided that "nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." *Ibid.*

In 1890, Congress passed an Act admitting Wyoming to the Union "on an equal footing with the original States in all respects whatever." Act of July 10, 1890, ch. 664, 26 Stat. 222. Under the terms of that Act, the United States granted certain public lands to Wyoming, *e.g.*, § 4, 26 Stat. 222-223, while other lands within the new State's boundaries remained public lands of the United States, see § 12, 26 Stat. 224. The statehood Act made no reference to the Crow's rights under the 1868 Treaty.

3. Shortly after Wyoming's admission to the Union, Congress enacted a statute authorizing the President to

"set apart and reserve" tracts of public lands as forest reservations. Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1103. Exercising that authority in 1897, President Cleveland issued a proclamation "reserv[ing] from entry or settlement and set[ting] apart as a Public Reservation" certain public lands bearing forests in northern Wyoming. Proclamation No. 30 (1897 Proclamation), 29 Stat. 909; see *id.* at 910 ("Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation."). The public reservation encompassed lands ceded by the Tribe in 1868 and adjacent to the Crow Reservation across the border in Montana. Pet. 7; J.A. 234.

The lands reserved by the 1897 Proclamation are known today as the Bighorn National Forest. Pet. Br. 10 & n.5. As part of the National Forest System, those lands are to be administered "for the purpose of securing favorable conditions of water flows" and "furnish[ing] a continuous supply of timber." 16 U.S.C. 475. They also are to "be administered for outdoor recreation, range, * * * and wildlife and fish purposes." 16 U.S.C. 528.

4. In 1989, a member of the Crow Tribe shot and killed an elk in the Bighorn National Forest. *Crow Tribe of Indians* v. *Repsis*, 73 F.3d 982, 985 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996). After the State of Wyoming prosecuted the tribal member for hunting without a state license, *ibid.*, the Tribe sued Wyoming state officials in federal district court in Wyoming, seeking a declaratory judgment that the Tribe and its members have a right under the 1868 Treaty to hunt on unoccupied lands of the United States, including National Forest lands, *id.* at 986.

The district court granted summary judgment to the state officials. *Crow Tribe of Indians* v. *Repsis*,

866 F. Supp. 520, 521-525 (D. Wyo. 1994). The court found controlling this Court's decision in *Ward* v. *Race Horse*, 163 U.S. 504 (1896), involving a nearly identical provision of a treaty with the Bannock Indians. *Id.* at 507; see Treaty Between the United States of America and the Eastern Band of Shoshonees and the Bannack Tribe of Indians (Shoshone-Bannock Treaty), July 3, 1868, art. IV, 15 Stat. 674-675; *Repsis*, 866 F. Supp. at 524. In *Race Horse*, this Court had perceived a conflict between the Bannock's right under the Shoshone-Bannock Treaty "to hunt on the unoccupied lands of the United States," art. IV, 15 Stat. 674, and the Act admitting Wyoming to the Union "on equal terms with the other States." 163 U.S. at 514. Based on that supposed conflict, the Court had concluded that the Shoshone-Bannock Treaty conveyed only a "temporary and precarious" right that would not continue beyond statehood, *id.* at 515, and that Wyoming's statehood Act had "repeal[ed]" that right, *id.* at 514. Finding *Race Horse* indistinguishable, the district court concluded that Wyoming's admission to the Union had likewise extinguished the Crow's right to hunt under the Tribe's 1868 Treaty. *Repsis*, 866 F. Supp. at 522-524.

The Tenth Circuit in *Repsis* affirmed, agreeing that *Race Horse* was indistinguishable and that the 1868 Treaty with the Crow Tribe conveyed only "a temporary right which was repealed with Wyoming's admission into the Union." 73 F.3d at 994. The Tenth Circuit also affirmed on an "alternative basis" that the district court had not reached. *Id.* at 993. The Tenth Circuit observed that the right to hunt under the 1868 Treaty extends only to "unoccupied" lands. *Ibid.* The court reasoned that when the 1868 Treaty was executed, "the

lands located in what is now the Big Horn National Forest were unoccupied" because "they were open for settlement in the westward expansion of the United States." *Ibid.* But, the court continued, when the Bighorn National Forest was created—such that no one could "timber, mine, log, graze cattle, or homestead on the[] lands without federal permission"—the "lands were no longer available for settlement." *Ibid.* The court concluded that, by rendering the lands unavailable for settlement, the creation of the Bighorn National Forest had rendered them "occupied." *Ibid.* The court therefore held that the Crow no longer had a right under the 1868 Treaty to hunt on those lands. *Id.* at 994.

Four years after the Tenth Circuit's decision in *Repsis*, this Court decided *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). Among the issues in *Mille Lacs* was whether the Act admitting Minnesota to the Union extinguished the Chippewa's rights to off-reservation hunting, fishing, and gathering under an 1837 treaty. *Id.* at 202-203; see *id.* at 175-177. In considering that question, the Court revisited *Race Horse* and determined that it had "rested on a false premise"—namely, that such treaty rights "conflicted irreconcilably" with state sovereignty. *Id.* at 204. Rejecting that premise and other aspects of *Race Horse*'s reasoning, *id.* at 205-208, the Court held that the Chippewa's treaty rights were not extinguished upon Minnesota's statehood, *id.* at 202-203, 207-208.

5. Petitioner is a member of the Crow Tribe who lives on the Crow Reservation in Montana. Pet. App. 5. In 2014, he and other tribal members went hunting on the Reservation. *Ibid.* When the elk they were hunting crossed a fence and entered the Bighorn National For-

est in Wyoming, petitioner and his companions followed. *Ibid.* There, on land ceded by the Tribe in 1868, they shot and killed three elk. *Ibid.* They then returned with the meat to the Reservation. *Ibid.*

The State of Wyoming cited petitioner for taking an antlered big-game animal during the State's closed season and for being an accessory to others' doing the same—both misdemeanors under state law. Pet. App. 5. Petitioner moved to dismiss the citations, contending that in taking the elk, he was exercising his right to hunt on unoccupied lands of the United States under the 1868 Treaty. *Id.* at 36-37.

The state trial court denied the motion to dismiss. Pet. App. 36-43. The court agreed with the Tenth Circuit's conclusions in *Repsis* that the Crow's treaty right was "temporary" and that the Bighorn National Forest "was 'occupied land' which terminated the * * * right." *Id.* at 38. The court also stated that even "if [petitioner] had the off-reservation right to hunt, the state of Wyoming may regulate that right in the interest of conservation," *id.* at 39, and petitioner "is subject to [those] regulations," *id.* at 40. Having decided the issue of "off-reservation treaty hunting rights" as a matter of "law," the court found an evidentiary hearing unnecessary, *id.* at 37.

Thereafter, a jury found petitioner guilty on both charges. Pet. App. 9. Petitioner received a one-year suspended jail sentence and a three-year suspension of hunting privileges. *Ibid.* He was also ordered to pay $8080 in fines and costs. *Ibid.*

6. The Wyoming district court affirmed. Pet. App. 3-35.

The Wyoming district court concluded that issue preclusion barred petitioner from relitigating the "judgment" of the "federal district court" in *Repsis* that the treaty right "was intended to be temporary in nature" and "was no longer valid." Pet. App. 14; see *id.* at 31. Recognizing application of issue preclusion to be a matter of federal law, *id.* at 12, the court found each of the prerequisites satisfied, including that petitioner is "in privity" with the Tribe, a party to the prior adjudication, *id.* at 17. The court also rejected petitioner's contention that the prior judgment should be denied preclusive effect in light of this Court's intervening decision in *Mille Lacs*. *Id.* at 20.

The Wyoming district court further determined that "[e]ven if collateral estoppel did not apply," Pet. App. 31, the trial court "appropriate[ly]" "adopt[ed]" the Tenth Circuit's "conclusions" in *Repsis*, *id.* at 34, that the "Tribe's right to hunt * * * was repealed by the act admitting Wyoming into the Union" and that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land," *id.* at 33 (quoting *Repsis*, 73 F.3d at 992-993).

The Wyoming Supreme Court denied review. Pet. App. 1-2.

SUMMARY OF ARGUMENT

I. The Crow did not lose their right under the 1868 Treaty to hunt on unoccupied lands of the United States when Wyoming became a State.

A. The 1868 Treaty itself specifies the circumstances under which the Crow's right to hunt would terminate. Because the treaty does not specify statehood as among those circumstances, the right to hunt under the treaty did not expire at statehood. Nor was that right repealed by the Act admitting Wyoming to the Union. That Act

does not mention the Crow's treaty right, let alone clearly express any intent to abrogate it. The Crow therefore retained their right to hunt on unoccupied lands of the United States after Wyoming became a State.

B. *Ward* v. *Race Horse*, 163 U.S. 504 (1896), does not compel a different conclusion. In *Race Horse*, the Court determined that the Bannock's right to hunt under the Shoshone-Bannock Treaty could not "coexist[]" with state sovereignty. *Id.* at 514. In light of that perceived conflict, the Court concluded that the treaty right either was "repeal[ed]" by Wyoming's statehood Act, *ibid.*, or was a "temporary and precarious" right not intended to continue past statehood, *id.* at 515.

This Court's subsequent decision in *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999), expressly repudiated both of those rationales. Rejecting the premise that "treaty rights are irreconcilable with state sovereignty," the Court in *Mille Lacs* held that "statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." *Id.* at 205. The Court also rejected "the 'temporary and precarious' language in *Race Horse* [a]s too broad to be useful in distinguishing rights that survive statehood from those that do not." *Id.* at 206. In light of *Mille Lacs*, the State's continued reliance on *Race Horse* is misplaced.

C. Issue preclusion does not bar petitioner from litigating whether the treaty right survived statehood. Following *Crow Tribe of Indians* v. *Repsis*, 866 F. Supp. 520 (D. Wyo. 1994), aff'd, 73 F.3d 982 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996), the applicable legal context changed when this Court decided *Mille Lacs*.

The federal district court's judgment in *Repsis* therefore is not entitled to preclusive effect.

II. The establishment of the Bighorn National Forest did not itself render lands within that forest occupied under the 1868 Treaty.

A. The text of the treaty indicates that the borders of the "unoccupied lands" were the "borders" between "the whites and Indians." 1868 Treaty, art. IV, 15 Stat. 650. Thus, so long as the lands remained unsettled by "the whites," the lands would remain "unoccupied." *Ibid.* Indeed, following the treaty's ratification, U.S. officials referred to the Crow's hunting right as a right to hunt where non-Indians had not settled.

B. The fact that an area has been designated as part of the National Forest System does not render that area occupied. In fact, the proclamation creating the Bighorn National Forest prohibited persons from settling the land within the forest. This is not to say that National Forest land is categorically "*un*occupied." The creation of a National Forest does not foreclose the federal government itself from administering a particular tract of land in such a way as to render it occupied.

C. Petitioner should not be precluded from litigating whether National Forest lands are categorically occupied. The Wyoming district court did not give preclusive effect to the Tenth Circuit's alternative holding on that issue in *Repsis*, and the question whether issue preclusion applies to such an alternative holding was not decided below.

ARGUMENT

When the State of Wyoming charged petitioner with taking elk on National Forest lands in violation of state hunting laws, petitioner moved to dismiss the charges on the ground that he had a right under the 1868 Treaty

to hunt on unoccupied lands of the United States. The Wyoming district court rejected that defense, following the Tenth Circuit's conclusions in *Crow Tribe of Indians* v. *Repsis*, 73 F.3d 982 (1995), cert. denied, 517 U.S. 1221 (1996), that: (1) the treaty right had been repealed by the Act admitting Wyoming to the Union; and (2) the creation of the Bighorn National Forest, in and of itself, "resulted in the 'occupation' of the land" for purposes of the treaty. Pet. App. 33-34 (quoting *Repsis*, 73 F.3d at 993). Neither conclusion is correct.

I. THE CROW'S RIGHT TO HUNT UNDER THE 1868 TREATY WAS NOT EXTINGUISHED BY WYOMING'S ADMISSION TO THE UNION

The 1851 Treaty designated "approximately 38.5 million acres as Crow territory." *Montana* v. *United States*, 450 U.S. 544, 548 (1981). Under the terms of the 1868 Treaty, the Crow relinquished their claim to most of that land, while retaining a "right to hunt on the unoccupied lands of the United States." Art. IV, 15 Stat. 650. That right was not extinguished upon Wyoming's admission to the Union, and it endures to this day.

A. Wyoming's Admission To The Union Did Not Terminate The Crow's Right To Hunt Under The 1868 Treaty

The 1868 Treaty does not provide for the right to hunt on unoccupied lands of the United States to terminate upon admission to the Union of a State encompassing such lands. Nor was that right repealed by the Act admitting Wyoming as a State.

1. The 1868 Treaty does not provide for the hunting right to terminate at statehood

a. The "starting point" for interpreting a treaty "is the treaty language itself." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999).

That language should "be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians," *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) (*Fishing Vessel*) (citation omitted), "with any ambiguities resolved in favor of the Indians," *Mille Lacs*, 526 U.S. at 206.

Article IV of the 1868 Treaty provides that the Crow "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 15 Stat. 650. The text of the treaty itself specifies the circumstances under which the right to hunt would no longer exist: (1) when the land is no longer "unoccupied"; (2) when the land is no longer owned by the United States; (3) when "game" may no longer be "found thereon"; and (4) when "peace" no longer "subsists among the whites and Indians on the borders of the hunting districts." *Ibid.* A State's admission to the Union is not one of those specified circumstances. Thus, under a straightforward reading of the treaty's text, the right to hunt did not expire when Wyoming was admitted to the Union in 1890.

This Court reached a similar conclusion in *Mille Lacs*. That case involved an 1837 treaty between the United States and several Bands of Chippewa Indians. *Mille Lacs*, 526 U.S. at 175; see Treaty of July 29, 1837 (1837 Treaty), 7 Stat. 536. The 1837 Treaty provides: "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes in-

cluded in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States." Art. 5, 7 Stat. 537.

The Court in *Mille Lacs* rejected the contention that the Chippewa's treaty rights were not intended to survive the admission of Minnesota to the Union in 1858. 526 U.S. at 206-208. The Court explained that "[t]he 1837 Treaty itself defines the circumstances under which the rights would terminate: when the exercise of those rights was no longer the 'pleasure of the President.'" *Id.* at 207. And the Court found "no suggestion in the Treaty that the President would have to conclude that the privileges should end when a State was established in the area." *Ibid.*

The 1868 Treaty likewise contains no suggestion that the Crow's right to hunt on unoccupied lands of the United States would terminate upon the admission to the Union of a State encompassing those unoccupied lands. Although the 1868 Treaty "tie[s] the duration of the right[] to the occurrence of some clearly contemplated event[s]," *Mille Lacs*, 526 U.S. at 207, statehood is not among them. As in *Mille Lacs*, this Court should decline to add to the events specified in the text of the treaty itself. See *Leatherman* v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius.*").

b. Nothing in "the history of the treaty" or its "negotiations," *Mille Lacs*, 526 U.S. at 196 (citation omitted), suggests that the Crow would have understood the hunting right to terminate upon the establishment of a State in the ceded area. Representatives of the United States met with the Crow to discuss a treaty in late 1867, see *Proceedings* 86, only eight months before the creation of a territorial government for Wyoming, see

1868 Act, 15 Stat. 178. Yet the record of the proceedings contains no suggestion by federal representatives that it was relevant that Wyoming could become a territory and later a State, or that Wyoming's eventual statehood would extinguish the Crow's right to hunt on lands ceded to the United States. See *Proceedings* 86-87, 89-90. Nor is there any reason to suppose that the Crow would have regarded the particular form of non-Indian government that might be created for the ceded area to be relevant to the commitments the United States was making.

Instead, representatives of the United States emphasized that the Crow would have "the right to hunt upon [the ceded lands] as long as the game lasts." *Proceedings* 86. The representatives viewed the decreasing availability of game as the most urgent threat to the Crow's ability to hunt, *ibid.*, warning that "[t]he game will soon entirely disappear," *id.* at 90. The Crow responded that "[t]here is plenty of buffalo, deer, elk, and antelope in [the] country," and that "whenever [the game] gets scarce," there "will be time enough to go farming." *Id.* at 91. In light of those discussions, the Crow would have been surprised to learn that their right to hunt would expire if Wyoming became a State, even while game could still be found on the unoccupied lands of the United States. The historical record thus reinforces the conclusion that follows from a straightforward reading of the treaty's text: The right to hunt under the 1868 Treaty did not terminate upon Wyoming's admission to the Union.

2. Wyoming's statehood Act did not repeal the hunting right reserved by the 1868 Treaty

The right to hunt under the 1868 Treaty likewise was not repealed by the Act admitting Wyoming to the Union. "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202. "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" *Id.* at 202-203 (quoting *United States* v. *Dion*, 476 U.S. 734, 740 (1986)).

Applying those principles in *Mille Lacs*, this Court determined that the Act admitting Minnesota to the Union did not abrogate the Chippewa's rights under the 1837 Treaty. 526 U.S. at 202-203. That Act provides: "[T]he State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever." Act of May 11, 1858, ch. 31, 11 Stat. 285. The Court observed that "[t]his language, like the rest of the Act, makes no mention of Indian treaty rights" and "provides no clue that Congress considered the reserved rights of the Chippewa and decided to abrogate those rights when it passed the Act." *Mille Lacs*, 526 U.S. at 203. The Court thus found no "'clear evidence' of congressional intent to abrogate the Chippewa Treaty rights" in Minnesota's statehood Act. *Ibid.*

There is likewise no clear evidence that Congress intended to abrogate the Crow's treaty rights when it passed the Act admitting Wyoming to the Union. In language similar to Minnesota's statute, Wyoming's statehood Act provides: "[T]he State of Wyoming is

hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever." Act of July 10, 1890, ch. 664, 26 Stat. 222. Neither that language nor any other in Wyoming's statehood Act mentions Indian treaty rights or hints that Congress considered the reserved rights of the Crow and decided to abrogate them. Because the right to hunt under the 1868 Treaty was not intended to terminate at statehood and was not repealed by the statehood Act, it was not extinguished when Wyoming was admitted to the Union.

B. In Light Of *Mille Lacs*, *Race Horse* Does Not Compel A Different Conclusion

In reaching a contrary conclusion, the lower courts in this case relied on the Tenth Circuit's decision in *Repsis*, see Pet. App. 32-34, 37-39, which in turn relied on this Court's decision in *Ward* v. *Race Horse*, 163 U.S. 504 (1896), see *Repsis*, 73 F.3d at 987-992, 994. But in light of this Court's subsequent decision in *Mille Lacs*, *Race Horse* does not compel the conclusion that the Crow lost their right to hunt when Wyoming became a State.

1. *Race Horse* involved a member of the Bannock Indians who lived on that tribe's reservation in Idaho. 163 U.S. at 505-506 (statement of the case). In 1895, the State of Wyoming charged him with killing seven elk in Wyoming in violation of state hunting law. *Id.* at 506. The tribal member argued that his detention violated Article IV of the Shoshone-Bannock Treaty, *ibid.*, which provides that the Bannock "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts," 15 Stat. 674-675. The question

presented was whether that treaty gave the Bannock "the right to exercise the hunting privilege, therein referred to, within the limits of the State of Wyoming in violation of its laws." *Race Horse*, 163 U.S. at 507.

In deciding that question, the Court in *Race Horse* observed that "[t]he act which admitted Wyoming into the Union * * * expressly declared that that State should have all the powers of the other States of the Union." 163 U.S. at 511. The Court stated that one of those powers is "to regulate the killing of game within their borders." *Id.* at 514. The Court therefore reasoned that, if the Shoshone-Bannock Treaty "was so construed as to allow the Indians to * * * disregard and violate" Wyoming's hunting laws, *id.* at 511, Wyoming "will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union," *id.* at 514.

To avoid that outcome, *Race Horse* rendered what this Court later described as two "alternative" holdings. *Mille Lacs*, 526 U.S. at 206; see *id.* at 203-208. The Court in *Race Horse* first held that Wyoming's statehood Act "repeal[ed]" the Bannock's right under the treaty to "hunt on unoccupied lands of the United States." 163 U.S. at 514. The Court reasoned that, "if the treaty applies to [such lands] in the State of Wyoming," "the treaty and the act admitting that State into the Union" would be "irreconcilable," with the "result[]" being a "repeal" of the treaty right by the statehood Act. *Ibid.*

The Court in *Race Horse* further concluded that the "treaty rights at issue were not intended to survive Wyoming's statehood" in the first place. *Mille Lacs*, 526 U.S. at 206; see *Race Horse*, 163 U.S. at 515-516. The Court

assumed that it would be "within the power of Congress" to create treaty rights that survived a State's "admission into the Union." *Race Horse*, 163 U.S. at 515. But the Court declined to construe the Shoshone-Bannock Treaty as recognizing such a "perpetual right." *Ibid.* Noting that under the terms of the treaty, the right to hunt would "cease whenever the United States parted merely with the title to any of its lands," the Court determined that the treaty should be construed as conveying only a "temporary and precarious" right that would not continue beyond statehood. *Ibid.* The Court reasoned that construing the treaty in that way would avoid any "conflict" with the statehood Act and the "rights" of Wyoming. *Id.* at 516.

2. A century later, this Court in *Mille Lacs* expressly repudiated the reasoning behind both of *Race Horse*'s alternative holdings.

a. As the Court in *Mille Lacs* explained, *Race Horse*'s "equal footing holding" rested on a "false premise." 526 U.S. at 204-205. *Race Horse* had concluded that Wyoming's statehood Act repealed the treaty rights on the premise that "the treaty rights conflicted irreconcilably with state regulation of natural resources —'an essential attribute of [a State's] governmental existence.'" *Id.* at 204 (quoting *Race Horse*, 163 U.S. at 516). But the Court in *Mille Lacs* explained that "subsequent cases ha[d] made clear" that "an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State." *Ibid.* "Rather," the Court continued, "Indian treaty rights can coexist with state management of natural resources." *Ibid.* In that vein, the Court noted that it had "repeatedly reaffirmed state authority to impose reasonable and necessary

nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation." *Id.* at 205.

The Court therefore held that "statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." *Mille Lacs*, 526 U.S. at 205. The Court reiterated that if Congress wishes to "abrogate Indian treaty rights," "it must clearly express its intent to do so." *Id.* at 202. And as explained above, see pp. 15-16, *supra*, Congress did not do so in either the Minnesota statehood Act in *Mille Lacs* or the Wyoming statehood Act here.

b. The Court in *Mille Lacs* also rejected the reasoning behind *Race Horse*'s alternative holding that "Congress (the Senate) could not have intended the rights to survive statehood." 526 U.S. at 208. That holding, the Court recognized, was likewise informed by *Race Horse*'s erroneous conclusion that "the Indian treaty rights were inconsistent with state sovereignty over natural resources." *Id.* at 207-208. In addition, the Court noted that *Race Horse* had viewed the "right to hunt on federal lands" as "temporary because Congress could terminate the right at any time by selling the lands." *Id.* at 207. But "[u]nder this line of reasoning," the Court explained, "any right created by operation of federal law could be described as 'temporary and precarious,' because Congress could eliminate the right whenever it wished." *Ibid.*

The Court therefore rejected "the 'temporary and precarious' language in *Race Horse* [a]s too broad to be useful in distinguishing rights that survive statehood from those that do not." *Mille Lacs*, 526 U.S. at 206. Instead, in determining whether the rights under the treaty were "intended" to "survive statehood," the Court

stressed that the treaty "itself defines the circumstances under which the rights would terminate." *Id.* at 207. The Court also noted that "there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood." *Ibid.*; see *ibid.* ("Treaty rights are not impliedly terminated upon statehood."). Those same basic points are applicable here. As explained above, see pp. 11-14, *supra*, the 1868 Treaty with the Crow, like the 1837 Treaty with the Chippewa, does not provide for the hunting right to terminate at statehood.

3. In light of *Mille Lacs*, the State's continued reliance on *Race Horse* is misplaced.

The State contends (Cert. Supp. Br. 12) that *Mille Lacs* did not overrule *Race Horse*. But *Mille Lacs* expressly repudiated *Race Horse*'s reasoning, 526 U.S. at 202-208, and the dissent in *Mille Lacs* understood that to mean that *Race Horse* had been "overrul[ed] *sub silentio*," *id.* at 220 (Rehnquist, C.J., dissenting), or at least "apparently" or "effectively" overruled, *id.* at 219 & n.3, 220; see also *State* v. *Buchanan*, 978 P.2d 1070, 1076, 1083 (Wash. 1999) (en banc) (agreeing that *Mille Lacs* "effectively overruled" *Race Horse*), cert. denied, 528 U.S. 1154 (2000).[1] And since *Mille Lacs*—indeed,

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[1] Even before *Mille Lacs*, some lower courts regarded *Race Horse* as no longer good law in light of *Tulee* v. *Washington*, 315 U.S. 681 (1942), and *United States* v. *Winans*, 198 U.S. 371 (1905). See *Holcomb* v. *Confederated Tribes of the Umatilla Indian Reservation*, 382 F.2d 1013, 1014 n.3 (9th Cir. 1967); *State* v. *Arthur*, 261 P.2d 135, 138-139 (Idaho 1953), cert. denied, 347 U.S. 937 (1954). Indeed, the Idaho Supreme Court declined to follow *Race Horse* in a case involving the same treaty at issue in *Race Horse* itself. *State* v. *Tinno*, 497 P.2d 1386, 1392 n.6 (1972); see *Shoshone-Bannock Tribes* v. *Fish & Game Comm'n*, 42 F.3d 1278, 1286 (9th Cir. 1994) (relying on *Tinno*). The United States filed an amicus brief in *Tinno*, *supra*

since even *Race Horse*—this Court has not found a tribe's off-reservation treaty right extinguished by a State's admission to the Union. The Court may therefore wish to take this opportunity to overrule *Race Horse* explicitly.

Regardless whether this Court takes that step, the outcome here should be the same. Given that this Court has already rejected *Race Horse*'s reasoning, it should, at a minimum, decline to extend that reasoning beyond the specific Shoshone-Bannock Treaty at issue in *Race Horse*. Just as *Race Horse* did not "compel" the rejection of rights under a different treaty in *Mille Lacs*, 526 U.S. at 208, *Race Horse* should not compel that outcome here.

Although the State acknowledges (Br. in Opp. 20) that *Mille Lacs* rejected *Race Horse*'s reliance on the "equal footing doctrine," it contends (*ibid.*) that *Mille Lacs* did not disturb *Race Horse*'s "approach" to the "interpretation of treaties." According to the State (*ibid.*), the "proper inquiry" is still the same: "whether the [treaty] rights were intended to be perpetual, or whether they were intended to expire upon the happening of an event." But the Court in *Race Horse*—informed by its view at the time that "Indian treaty rights were inconsistent with state sovereignty," *Mille Lacs*, 526 U.S. at 207—was willing to infer that such rights were "temporary and precarious," and thus not intended to survive statehood, based merely on the fact that they would

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(No. 10737), arguing (at 19-20) that the theory of *Race Horse* had been repudiated by, *inter alia*, *Tulee* and *Winans*. *Tinno* was decided well before *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989), which admonished lower courts to "leav[e] to this Court the prerogative of overruling its own decisions." *Id.* at 484.

expire upon the happening of some *other* event (such as Congress's "selling the lands"). *Id.* at 206-207.

The Court in *Mille Lacs* rejected that "broad"-brush approach to treaty interpretation. 526 U.S. at 207. It required instead a more focused inquiry into whether treaty rights were intended to survive statehood and stressed that the 1837 Treaty did not identify statehood as a termination point. *Ibid.* The Court further held that "[t]reaty rights are not impliedly terminated upon statehood," and that "there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood." *Ibid.* And the Court noted that the "*Race Horse* Court's decision to the contrary—that Indian treaty rights were impliedly repealed by Wyoming's statehood Act—was informed by that Court's conclusion that the Indian treaty rights were inconsistent with state sovereignty over natural resources." *Id.* at 207-208. The Court in *Mille Lacs* rejected that conclusion as well. *Id.* at 203-205. Thus, far from "reaffirm[ing]" *Race Horse*'s approach, Br. in Opp. 20, *Mille Lacs* repudiated it. Under the inquiry called for by *Mille Lacs*, the right to hunt under the 1868 Treaty was not intended to expire when Wyoming was admitted to the Union. See pp. 11-14, *supra*.[2]

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[2] The government argued in *Mille Lacs* that, "whatever vitality *Race Horse* retain[ed]," the Chippewa's rights under the 1837 Treaty were not "'temporary'" or "'precarious'" like the treaty right in *Race Horse*. U.S. Br. at 42-44, *Mille Lacs*, *supra* (No. 97-1337). In particular, the government argued that, whereas the rights under the 1837 Treaty lacked "any fixed termination point," the right under the Shoshone-Bannock Treaty would "continue only for so long as [the Bannock's] hunting grounds remained unoccupied and owned by the United States, conditions whose 'disappearance' was already 'clearly contemplated' at the time that the treaty was ratified." *Id.* at 44 (quoting *Race Horse*, 163 U.S. at 509). Although the

C. Petitioner Should Not Be Precluded From Litigating Whether The Treaty Right Survived Statehood

In addition to holding that the trial court properly "adopt[ed]" the "conclusions" of the Tenth Circuit in *Repsis*, Pet. App. 34, the Wyoming district court determined that petitioner is precluded from litigating whether the Crow's "off-reservation treaty hunting right" is "no longer valid" because "the right was intended to be temporary in nature," *id.* at 14. That determination is incorrect.

Issue preclusion (or collateral estoppel) bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted). The Wyoming district court identified the relevant prior judgment here as the "judgment" of the "federal district court" in *Repsis* that was affirmed on appeal. Pet. App. 14; see *id.* at 18. Petitioner was not a party to that adjudication, but the Tribe was. *Crow Tribe of Indians* v. *Repsis*, 866 F. Supp. 520 (D. Wyo. 1994). And like the "very great majority" of Indian treaty rights, the right to hunt under the 1868 Treaty is a right reserved to the Tribe as a whole. *Hebah* v. *United States*, 428 F.2d 1334, 1337 (Ct. Cl. 1970)

Court in *Mille Lacs* noted that distinction in the course of concluding that the Chippewa's treaty rights were not extinguished upon statehood, 526 U.S. at 207, it rejected "the 'temporary and precarious' language in *Race Horse*" at which the distinction had been aimed, *id.* at 206. It also emphasized that the "1837 Treaty itself defines the circumstances under which the rights would terminate," and that treaty rights cannot "be extinguished by *implication* at statehood." *Id.* at 207. Thus, following *Mille Lacs*, even if a treaty "tie[s] the duration of the rights to the occurrence of some clearly contemplated event[s]," *ibid.*, the rights should not be held to expire at statehood unless statehood itself is one of those specified events.

(citing *Blackfeather* v. *United States*, 190 U.S. 368, 377 (1903)). Thus, in appropriate circumstances, a civil judgment against the Tribe in a suit pertaining to its rights under the 1868 Treaty could be given preclusive effect in subsequent litigation involving an individual tribal member who was not a party to the prior suit. Cf. *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106-108 (1938) (holding that the judicial apportionment of water rights in litigation between States is binding upon the citizens of each State).

This Court has recognized, however, that the "general rule" of "issue preclusion" does not apply when "a 'change in the applicable legal context' intervenes." *Bobby* v. *Bies*, 556 U.S. 825, 834 (2009) (brackets and citation omitted). After *Repsis* was decided, *Mille Lacs* expressly repudiated *Race Horse*'s conclusion that off-reservation "treaty rights are irreconcilable with state sovereignty" and are thus "extinguish[ed]" upon statehood. 526 U.S. at 205. *Mille Lacs* also held that *Race Horse*'s characterization of a treaty hunting right as "'temporary and precarious'" was "too broad to be useful as a guide" to whether that right was "intended to survive statehood." *Id.* at 206-207. *Mille Lacs* thus changed the applicable legal context with respect to both of *Race Horse*'s rationales. Because the federal district court's judgment in *Repsis* rested on *Race Horse*, see 866 F. Supp. at 522-524, it is not entitled to preclusive effect.

II. THE ESTABLISHMENT OF THE BIGHORN NATIONAL FOREST DID NOT ITSELF RENDER LANDS WITHIN THAT FOREST OCCUPIED UNDER THE 1868 TREATY

Under the 1868 Treaty, the Tribe's hunting right extends only to "unoccupied lands of the United States."

Art. IV, 15 Stat. 650. The Tenth Circuit in *Repsis* determined that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land" for purposes of the 1868 Treaty because the land was "no longer available for settlement." 73 F.3d at 993. Under the 1868 Treaty, however, unsettled lands *are* "unoccupied lands." Thus, the creation of the Bighorn National Forest, in and of itself, did not render lands within the forest occupied.

A. Under The 1868 Treaty, "Unoccupied Lands" Are Lands That Have Not Been Settled

Although the 1868 Treaty does not define the term "unoccupied lands," the text of the treaty indicates that the term refers to lands not settled by "the whites." Art. IV, 15 Stat. 650. The text provides that the Crow "shall have the right to hunt on the unoccupied lands of the United States * * * as long as peace subsists among the whites and Indians on the borders of the hunting districts." *Ibid.* Both "unoccupied lands" and "hunting districts" thus refer to the areas where the Crow may hunt. And the text indicates that the "borders" of those areas were the borders between "the whites and Indians." *Ibid.* It follows that as "the whites" settled more land, the land would become "[]occupied." *Ibid.* Conversely, as long as the land was not settled by "the whites," the land would remain "unoccupied." *Ibid.*; cf. art. II, 15 Stat. 650 (setting apart the Crow Reservation for "use and occupation of the Indians" and providing that others may not "settle upon" that land).

The historical record supports that understanding. See *Mille Lacs*, 526 U.S. at 196 (explaining that treaty language should be construed in light of "history" and "the practical construction adopted by the parties") (citation omitted). During subsequent consideration of a

bill to make appropriations to fulfill the United States' obligations under the 1868 Treaty, Senator Harlan reminded his colleagues that the treaty permitted the "Indians to hunt, so long as they can do so without interfering with the settlements." Cong. Globe, 40th Cong., 3d Sess. 1348 (1869). Senator Harlan explained: "So long as outside lands, outside of the reservation, may not be occupied by settlements, and may be occupied by game, they may hunt the game." *Ibid.*

A representative of the United States echoed that interpretation during negotiations to secure further cessions of land from the Crow. See Act of Mar. 3, 1873, ch. 321, 17 Stat. 626 (authorizing negotiations). Addressing tribal members, the federal representative described the 1868 Treaty as allowing the Crow to hunt "where there are not too many whites." U.S. Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1873*, at 135 (1874); see *id.* at 132 (stating that the treaty allowed the Crow to hunt "as long as there are any buffalo, and as long as the white men are not here * * * with farms"). The historical record thus indicates that the parties understood "unoccupied lands" to refer to lands "the whites" had not settled.

B. Lands Do Not Become Settled Simply By Virtue Of Becoming Part Of The National Forest System

1. Given that "unoccupied lands" are lands that have not been settled, the fact that an area has been designated as part of the National Forest System does not render that area "[]occupied." Quite the opposite, the creation of the Bighorn National Forest meant that those "lands were no longer available for settlement" by private persons. *Repsis*, 73 F.3d at 993. Indeed, the 1897 Proclamation setting apart those lands "expressly"

"[w]arn[ed]" "all persons not to * * * make settlement upon" them. 29 Stat. 910.

Such a prohibition on settlement would not have led the Crow to think that those lands had become "[]occupied" and thus off limits for hunting. During negotiations leading up to the 1868 Treaty, the Crow and the United States had agreed that settlement of Crow territory by "white people" was "driv[ing] away" the "game." *Proceedings* 86 (statement of Commissioner Taylor); see *id.* at 87 (statement of Bear's Tooth) ("Your young men scare away the game and I have none left."); *id.* at 88 (statement of Black Foot) ("We are being surrounded by the whites and by other nations. * * * The whites have made two branches of a road besides the California and have cut up the best game country we have."). The Crow therefore would have naturally understood the 1897 Proclamation as making the lands within the National Forest more secure for hunting—not as extinguishing the treaty hunting right on those lands.

In concluding that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land," 73 F.3d at 993, the Tenth Circuit in *Repsis* did not examine the words of the 1868 Treaty or consider how they "would naturally be understood by the Indians," *Fishing Vessel*, 443 U.S. at 676 (citation omitted). Its counterintuitive conclusion that lands closed to private settlement and set aside as a forest reserve should categorically be considered "[]occupied" has no sound basis in the text or history of the treaty.

2. This is not to say that lands within a National Forest must categorically be considered "*un*occupied." The establishment of a National Forest prohibits private settlement of lands within the forest. *E.g.*, 1897 Proclamation, 29 Stat. 910. But it does not foreclose the federal

government itself from administering a particular tract of National Forest land in such a way that renders that land occupied within the meaning of the 1868 Treaty. See *State* v. *Cutler*, 708 P.2d 853, 856 (Idaho 1985) (explaining that the "federal government is not necessarily foreclosed from using specific tracts of lands in such a manner that the signatory Indians to treaties would have understood the lands to be claimed, settled or occupied"). For example, the U.S. Forest Service may construct roads, campsites, or administrative buildings on particular tracts of National Forest land. Where the Forest Service has done so, those areas may be considered occupied under the 1868 Treaty, such that the Crow have no treaty right to hunt in them. Consistent with that understanding, a Forest Service regulation prohibits the discharge of firearms "within 150 yards of a residence, building, campsite, developed recreation site *or occupied area*" on National Forest lands. 36 C.F.R. 261.10(d)(1) (emphasis added).[3]

The Tenth Circuit in *Repsis*, however, concluded that the establishment of the Bighorn National Forest, by itself, rendered the land occupied, without considering the uses to which the Forest Service had put any

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[3] There is no blanket prohibition on hunting on National Forest lands; rather, hunting is permitted, so long as it would not violate a specific "Federal or State law." 36 C.F.R. 261.8; see 36 C.F.R. 251.50(c) (providing that a "special use authorization" is generally "not required" for "hunting" on National Forest lands); see also 43 U.S.C. 1732(b) (authorizing the Secretary of Agriculture to "designate areas of * * * National Forest [lands] where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law"). State law, however, would be preempted to the extent petitioner had a right under the 1868 Treaty to hunt in this case. U.S. Const. Art. VI, Cl. 2.

particular tract. 73 F.3d at 993. The courts below simply adopted that analysis, without considering the circumstances of this particular case or the view of the Forest Service. Pet. App. 34, 38. Indeed, the trial court had originally scheduled an evidentiary hearing "to address the meaning of the Crow Treaty and its application to the site where the elk were killed," *id.* at 6, but the court canceled that hearing after concluding that petitioner had no right to hunt under the treaty as a matter of "law," *id.* at 37; see *id.* at 43. If this Court were to reverse that legal conclusion, an evidentiary hearing would be appropriate on remand to the extent there is a factual dispute over whether the site where the elk were killed was being used in a way that rendered it occupied.[4]

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[4] On remand, an evidentiary hearing would also be appropriate to address whether prohibiting the Crow from hunting during the State's closed season was necessary for the conservation of elk in 2014. Although usufructuary rights reserved by a federal treaty may "not be qualified by the State," *Antoine* v. *Washington*, 420 U.S. 194, 207 (1975) (citation omitted), States may impose certain regulations if they can "demonstrate that [the] regulation is a reasonable and necessary conservation measure" and that application of the regulation to the tribe in particular is "necessary in the interest of conservation," *ibid.* Petitioner appealed the state trial court's conclusion that the State "may regulate [his treaty] right in the interest of conservation," Pet. App. 39; see Pet. Cert. Supp. Br. 2, but the Wyoming district court did not reach the issue, Pet. App. 14 n.3, 25 n.7. On remand, the lower courts would not be bound by the Tenth Circuit's statement in *Repsis* that the State's "regulations were reasonable and necessary for conservation." 73 F.3d at 993. That is because the issue would be whether prohibiting the Crow from hunting during the State's closed season was necessary for the perpetuation or preservation of state elk populations in 2014, not whether it was necessary two decades ago. See *Antoine*, 420 U.S. at 207.

C. Petitioner Should Not Be Precluded From Litigating Whether National Forest Lands Are Categorically Occupied

The State errs in contending (Br. in Opp. 17-18) that petitioner should be precluded from litigating whether the establishment of the Bighorn National Forest rendered the land within the forest no longer "unoccupied" under the 1868 Treaty. As noted above, see p. 23, *supra*, the Wyoming district court viewed the relevant prior judgment for purposes of issue preclusion as the "judgment" of the "federal district court" in *Repsis* that was affirmed by the Tenth Circuit. Pet. App. 14; see *id.* at 18. The only treaty-related question addressed by the federal district court was whether the treaty right "was no longer valid" because "the right was intended to be temporary in nature." *Id.* at 14; see *Repsis*, 866 F. Supp. at 522-524. That court "did not reach" the issue whether "the lands of the Big Horn National Forest are 'occupied.'" *Repsis*, 73 F.3d at 993. Accordingly, the Wyoming district court gave preclusive effect only to the federal district court's holding, affirmed on appeal, that the treaty right was temporary and no longer valid. Pet. App. 14, 18; cf. *id.* at 33 (noting, in discussing the merits without regard to issue preclusion, the Tenth Circuit's alternative holding on the "unoccupied" issue) (quoting *Repsis*, 73 F.3d at 993).

Although the Tenth Circuit in *Repsis* did decide whether "the lands of the Big Horn National Forest are 'occupied,'" it did so only very briefly and only as an "alternative basis for affirmance." 73 F.3d at 993. In response to the Wyoming district court's *sua sponte* request for briefing on issue preclusion, petitioner argued that such an alternative holding should not be given preclusive effect. Pet. D. Ct. Supp. Br. 26. The State, by

contrast, identified the 1868 Treaty's "application to national forest land in Wyoming" as part of the "issue" petitioner should be precluded from litigating. State D. Ct. Supp. Br. 4 (emphasis omitted). But in identifying the relevant prior adjudication, the State referred only to what "was necessarily adjudicated on the merits with the grant of summary judgment," without specifically addressing whether an alternative holding on appeal should be given preclusive effect. *Id.* at 11. The Wyoming district court likewise did not address that question, let alone take sides in what the State asserts (Br. in Opp. 17 n.4) is "a split of authority" on the preclusive effect of alternative holdings.

Given that this Court does not ordinarily consider questions not addressed below, see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."), it should decline to consider whether issue preclusion applies to the Tenth Circuit's alternative holding in *Repsis* that lands within the Bighorn National Forest are occupied. That will allow the Court to undertake a full examination of the scope of the treaty right after giving fresh consideration to whether that right survived Wyoming's statehood (the primary issue in *Repsis* and the proceedings below) and taking into account the position of the United States (the other party to the treaty) that National Forest lands are not categorically occupied within the meaning of the treaty.

CONCLUSION

The judgment of the Wyoming district court should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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SEPTEMBER 2018

No. 17-532

In the Supreme Court of the United States

CLAYVIN HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ of Certiorari to the District Court of Wyoming, Sheridan County

BRIEF FOR THE ASSOCIATION OF FISH AND WILDLIFE AGENCIES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether Wyoming's admission to the Union, or the establishment of the Bighorn National Forest, abrogated the Crow Tribe of Indians' right to hunt on the "unoccupied lands of the United States" negotiated in the Second Treaty of Fort Laramie (1868), thereby allowing for the 2016 criminal conviction of a Crow member who hunted elk on the Bighorn National Forest in Wyoming during closed season.

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INTEREST OF AMICUS CURIAE

The Association of Fish and Wildlife Agencies ("Association") is a nonprofit professional association that represents the state, provincial, and territorial fish and wildlife agencies of the United States and Canada.[1] These agencies are responsible for conserving wildlife resources on public and private lands within their borders. The Association supports science-based management and conservation policy, strengthened by a collaborative approach to governance of public wildlife and land use. Since 1902 the Association has built and maintained a productive network of state, federal, and private stakeholders who all seek to advance lasting solutions to wildlife management challenges, from conservation financing to climate change adaptation to law enforcement. For more than a century the Association has helped shape state agency governance and advocated for dedicated funding sources to conserve game and non-game species.

From time to time the Association has participated as *amicus curiae* to protect the rights and interests of its member agencies as the primary trustees for the states' wildlife resources. Each of the Association's member agencies exercises its constitutionally or statutorily derived powers to achieve the common goals of fish and wildlife conservation and public enjoyment

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[1] Pursuant to this Court's Rule 37.6, amicus and its counsel note that no part of this brief was authored by counsel for any party, and no person or entity other than the Association or its members made any monetary contribution to the preparation or submission of the brief. The parties have filed blanket consents to the filing of amici briefs in this matter.

of those resources. This goal is best met when application of the law—whether in statute, regulation, or treaty—is clear and consistent, allowing wildlife managers to address urgent issues as they arise. The authority of one of our member agencies to manage resident wildlife is at stake in this case, and the same goes for the agencies of many other states on whose lands a reversal of the court below could revive off-reservation treaty rights to hunt and fish in derogation of prevailing state and federal law.

In this case, the District Court of Wyoming for Sheridan County affirmed Petitioner's conviction on charges of taking big game during Wyoming's closed season and for being an accessory to the same, rejecting his defense of treaty rights under the Second Treaty of Fort Laramie of 1868 ("Crow Treaty"). The Association files this brief because its member agencies have a direct and substantial interest in affirmance of the ruling below.

The filing of this brief was authorized by the Executive Committee of the Association during its meeting on August 9, 2018. The brief is filed with the blanket consent of Petitioner and Respondent under this Court's Rule 37.2(a).

SUMMARY OF ARGUMENT

The Association's member state agencies, including the Wyoming Game and Fish Department, retain the primary legal authority to manage fish and wildlife within their borders to the extent that there is no conflict with federal law. The agencies derive this authority from their state police power and public trust authority over fish and resident wildlife. If this Court

reverses the judgment of the court below, Wyoming's and other states' long-recognized authority to regulate the use of resident wildlife could be instantly curtailed, with highly uncertain results for tribal and non-tribal beneficiaries as well as state and federal managers of natural resources. We ask this Court to affirm the ruling of the district court.

ARGUMENT

I. REVERSAL OF THE JUDGMENT OF THE WYOMING DISTRICT COURT WOULD HARM STATE FISH AND WILDLIFE CONSERVATION ACROSS THE WESTERN UNITED STATES.

The Association adopts the facts and arguments raised in Respondent's brief. The Association believes it can be of most use by providing this Court with an overview of its member agencies' legal authority to manage fish and wildlife within their borders, and by discussing how reversal of the Wyoming district court would harm fish and wildlife conservation across the United States.

A. States have primary legal authority to manage fish and wildlife within their borders with the exception of federally protected species.

States have primary legal authority to manage fish and resident wildlife within their borders, with the specific exception of species protected under federal law, such as the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, or the Migratory Bird Treaty Act, 16

U.S.C. §§ 703-712.[2] States exercise their police power to conserve wild, non-domesticated species in trust for all people, in conformity with precedent spanning two centuries.

State ownership of natural resources was first recognized in 1821 by New Jersey's highest court. *Arnold v. Mundy*, 6 N.J.L. 1, 43 (N.J. Sup. Ct. 1821) (finding that navigable waters and the lands below them came into state trusteeship following the American Revolution). This Court, in *Martin v. Waddell's Lessee*, adopted the *Arnold* court's theory of trust ownership and recognized that the people of a state retain the right to fish in its navigable and tidal waters subject to state ownership. 41 U.S. 367, 368 (1842). Next, in *Geer v. Connecticut*, this Court applied the public trust directly to wildlife:

> The ownership being in the people of the state, the repository of the sovereign authority . . . it necessarily results that the legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game or qualify or restrict [that right], as . . . will best subserve the public welfare.

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[2] *See Missouri v. Holland*, 252 U.S. 416, 435 (1920) (holding that the Migratory Bird Treaty prevailed over state regulation of migratory birds pursuant to the Supremacy Clause); *Kleppe v. New Mexico*, 426 U.S. 529, 547 (1976) (holding that the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331 *et seq.*, authorizes the federal government, pursuant to the Property Clause, to regulate wild horses and burros); *Hughes v. Oklahoma*, 441 U.S. 322, 342 (1979) (holding that state regulations of wildlife may be invalidated for improper discrimination against interstate commerce).

161 U.S. 519, 533 (1896). Even in *Hughes v. Oklahoma*, where this Court overturned a state prohibition on transport of minnows out-of-state for discrimination against interstate commerce, the Court recognized in unambiguous terms the need to preserve "the legitimate state concerns for conservation and protection of wild animals" as "legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens." 441 U.S. 322, 335-37 (1979).

At least seven states have amended their constitutions to codify a state common-law public trust in fish and wildlife, thereby creating authority to manage those resources.[3] In at least twelve others the

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[3] *See* ALASKA CONST. art. VIII, § 4 ("Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses."); HAW. CONST. art. XI, § 1 ("For the benefit of present and future generations, the State...shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State."); LA. CONST. art. IX, § 1 ("The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety and welfare of the people."); MASS. CONST. art. XCVII ("The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby

public trust is recognized expressly through statute, while in 29 others the state's judiciary has interpreted state authority or been persuaded by rulings in sister states to recognize a public trust encompassing wildlife. *See* Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 6 UTAH L. REV. 1437, 1493-1504 (2013).

This public trust obligation, including the mechanisms for disposition of resources and public accountability, comes in many forms. In some states a private or governmental cause of action is available,[4]

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declared to be a public purpose."); MONT. CONST. art. II, § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment..."); PENN. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."); TEX. CONST. ANN. art. 16, § 59(a) ("The conservation and development of all of the natural resources of this State . . . and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.").

[4] *Compare Ctr. for Biological Diversity, Inc. v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 590-91 (Cal. Ct. App. 2008) ("[P]rivate parties have the right to bring an action to enforce the public trust [in wildlife]") *with In re Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980) (holding that, while "no individual citizen" has a PTD right to seek recovery for damages to waterfowl, "the state certainly has a sovereign interest" in doing so).

while in others one finds an emphasis on public welfare or mixed use of resources.[5]

For all of these variations, such provisions show clearly that "the state ownership doctrine lives on in the twenty-first century in virtually all states, affording states ample authority to regulate the taking of wildlife and to protect their habitat." Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 706 (2005).

State ownership of wildlife not only encourages, but requires stewardship on behalf of all residents. Bound together by a shared history of emergency and renewal, professional and recreational conservationists pursue management and enjoyment of wildlife based on principles of public trust, sound science, and rule of law.

B. Even under the understanding of treaty rights and state sovereignty established by *Mille Lacs*, the hunting rights at issue were terminated by federal and state law.

State fish and wildlife agencies regulate game harvest in order to conserve resources, obtain data, and ensure public safety. Through regulations setting open seasons, allowable means for harvest, bag limits, and available tags, state agencies apply the best available

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[5] *See, e.g.*, ALASKA CONST. art. VIII, § 4 (articulating mixed-use and sustained-yield principles); LA. CONST. art. IX, § 1 (balancing protection of environmental resources with public health, safety, and welfare).

science to sustain the activities that perpetuate the bonds between people and nature.

The need for interjurisdictional regulatory certainty, where it can be secured, cannot be overstated. In 2010 The Wildlife Society, an international scientific organization devoted to wildlife conservation, identified resource availability for enforcement of seasons, bag limits, and methods of take, as a key challenge to wise state allocation of wildlife resources, including regulation of harvest. THE WILDLIFE SOC'Y, THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION, Tech. Rev. 12-04 at 18 (Dec. 2012). In particular a "lack of specific permits" may reduce the ability of a state wildlife agency to base its decisions in science and collaborate with its federal counterparts. *Id.*[6]

While the scope of *Geer* and its progeny has been limited over the course of the twentieth century, *see note* 2 *supra*, states continue to enjoy a "presumption of legislative validity" when exercising their broad police powers in the public interest. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). Wyoming's law enforcement personnel, in exercising the state's police powers against Petitioner, were working well within the bounds of authority still recognized by courts in a majority of states, *see* Blumm & Paulsen, *supra*, at

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[6] *See also* H. Rep. No. 238, 115th Cong., 1st Sess. 6 (2017) ("The Department of the Interior and the U.S. Forest Service are expected to prioritize continued coordination with other Federal agencies and State fish and wildlife agencies to recognize and fully utilize State fish and wildlife data and analyses as a primary source to inform land use, planning, and related natural resource decisions.").

1493-1504, and blessed by this Court in *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603-604 (2012), which held that the public trust doctrine "do[es] not depend on the [U.S.] Constitution" and "remains a matter of state law[.]"

The Wyoming Game and Fish Department (WGFD) was created by the state's legislature, WYO. STAT. ANN. § 23-1-401, and is supervised by the Wyoming Game and Fish Commission (WGFC), itself created in 1911. *See* David Willms & Anne Alexander, *The North American Model of Wildlife Conservation in Wyoming: Understanding It, Preserving It, and Funding Its Future*, 14 WYO. L. REV. 659, 674 (2014). State ownership of wildlife in Wyoming is expressed in typical statutory form. WYO. STAT. ANN. § 23-1-103 ("For the purpose of [1939 Wyo. Sess. Laws 83-116], all wildlife in Wyoming is the property of the state . . . It is the purpose of this act and the policy of the state to provide an adequate and flexible system for control, propagation, management, protection and regulation of all Wyoming wildlife . . . ").

Early in the life of the WGFD, agency leaders joined with volunteer conservationists to translocate elk from Jackson Hole and other areas in Wyoming to the Bighorn Mountains and create feedgrounds to counteract the elimination of winter ranges. Some of these elk transplants occurred with the support of the Federal Aid in Wildlife Restoration Act ("Pittman-Robertson Act"), which apportions funds from an excise tax on firearms and ammunition to state fish and wildlife agencies for wildlife and habitat management. 16 U.S.C. §§ 669-669i (2012). *See* CALVIN L. KING, REESTABLISHING THE ELK IN THE BIGHORN MOUNTAINS

OF WYOMING 5-37 (1963); Willms & Alexander, *supra*, at 677.

Article IV of the 1868 Treaty specifies that the Crow "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 15 Stat. 650.

Even though the 1868 Treaty did not name Wyoming statehood as a circumstance that would terminate the Crow's right to hunt, and Indian treaties are generally interpreted to mean what tribal parties would have understood them to mean at the time of their negotiation, *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999), federal and state regulation of land and wildlife resources within Wyoming's borders sufficed to extinguish the Article IV right as contemplated by the Treaty parties by asserting jurisdiction over ceded lands. *See* Section II(b) *infra*; Br. of Resp. at 6-10.

Chiefly this occurred through federal recognition and reservation of state authority over wildlife. In 1899, Congress enacted a law regarding the protection and administration of forest preserves, directing national forest administrators, supervisors, and agents to "aid in the enforcement of the laws of the State or Territory in which said forest reservation is situated, in relation to the protection of fish and game . . . " 30 Stat. 1095.

This statute augured a longstanding state-federal consensus, reaffirmed nearly a century later in federal regulation, that state agencies retain authority to

manage fish and wildlife resources on federal land. As 43 C.F.R. 24.3(a), promulgated in 1983, reaffirms: "In general the States possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State."

As for the National Forest System, not covered by 43 C.F.R. part 24, the Federal Land Policy and Management Act ("FLPMA") provides equivalent language:

> [N]othing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as *enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife.*

43 U.S.C. § 1732(b) (emphasis added).

While 43 C.F.R. 24.3(a) also recognizes that treaties constitute a source of Federal authority to manage fish and wildlife, *id.*, the same canons requiring congressional clarity to terminate tribal treaties counsel great caution in finding displacement of state management authority. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (federal exercise of preemptive powers in traditional areas of state regulation is "extraordinary . . . in a federalist system" and must be "exercise[d] lightly").

Of course FLPMA's language does not address the question of what rights survive in the 1868 Treaty, but this Court's canons of federalism and its holdings on public trust from *Geer* to *PPL Montana*, along with the

congressional and regulatory recognitions of state management authority dating to 1899, all show that courts, lawmakers, and regulators over the lifetime of the Treaty understood that it would take a clear showing from Congress to curtail the authority of state fish and wildlife agencies to regulate game within their borders. Defeasible treaty rights like the one in Article IV of the 1868 Treaty do not amount to such a showing.

Therefore WGFD retains its authority to manage fish and game within Wyoming, and its law enforcement officers retained authority to cite Petitioner for the misdemeanors of taking big game without a license or during closed season, to which assertion of the Article IV right cannot be a defense.

II. REVERSAL OF THE JUDGMENT OF THE WYOMING DISTRICT COURT WOULD CAUSE JURISDICTIONAL CONFUSION BETWEEN STATE, TRIBAL, AND FEDERAL LAND MANAGERS.

Management of wildlife resources held in trust by the states on one hand, and federal lands on the other, is a delicate dance even without the surprise of off-reservation treaty rights long understood by game managers to be extinguished. Recognizing the right in Article IV of the 1868 Treaty would produce even more jurisdictional uncertainty, and burden the administration of the wildlife trust held for all people.

A. Even if the Crow's right to hunt was not extinguished by Wyoming's statehood, Wyoming should retain authority to regulate tribal hunting off-reservation because this Court and the Forest Service have both interpreted *Mille Lacs* to allow for such regulation.

In 1968, this Court ruled that a state may exercise its police power to regulate tribal fishing off-reservation pursuant to surviving treaty rights in the interest of conservation if "the regulation meets appropriate standards and does not discriminate against the Indians." *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 (1968) (citing *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 563-64 (1916): "[The reserved treaty right] is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees . . . but subject, nevertheless, to that necessary power of appropriate regulation . . . which inhered in the sovereignty of the state over the lands where the privilege was exercised.").[7]

While the *amicus* brief of the natural resources law professors asserts that tribal members "tend to take only a small percentage of the available large game animals" and cites irrelevant 2016 deer figures from

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[7] The Ninth Circuit elaborated on this "conservation necessity" standard by requiring that such measures be necessary to preserve a reasonable margin of safety between existing levels of stock and imminence of extinction (for fishing), *United States v. Oregon*, 718 F.2d 299, 305 (9th Cir. 1983), whereas the Tenth Circuit has not elaborated beyond *Puyallup*.

Wisconsin for this assertion, Br. of Natural Res. Law Profs. at 22-23, tribal take must not be considered in a vacuum separate from the factors that inform elk management throughout the state of Wyoming. Though the amicus professors assert that elk populations in the Bighorn National Forest are currently "higher than the desired management goal," *id.* at 23, the seasons, harvest limits and other regulations set by WGFD are expressly targeted to mitigate the effects of the type of off-season conduct engaged in by petitioner, i.e., "activity on winter range involv[ing] collection of antler sheds" which can disturb the range, "increase mortality[,]" and result in a "lack of elk security." U.S. Forest Serv., *Final Environmental Impact Statement for the Revised Land and Resource Management Plan* at 3-219–3-220 (2005). As the Forest Service's EIS for Bighorn states: "[U]nder most climate conditions, hunter harvest is the most important factor influencing population abundance." *Id.* at 3-221. Without the extent of its full authority to regulate tribal and non-tribal hunting alike, WGFD may be unable to fully satisfy the environmental requirements for secure elk populations.

Accommodating state conservation needs under *Puyallup* is a well-trod and reasonable path for this Court to take. But it is not the only path that would reaffirm WGFD's authority to regulate tribal hunting off-reservation. This Court has previously shown due concern for exercises of federal jurisdiction that terminate tribal treaty rights in the interest of resource management, and should do the same here.

In *South Dakota v. Bourland*, this Court held that the Flood Control Act of 1944, 58 Stat. 887, and the Cheyenne River Act of 1954, 68 Stat. 1191, jointly

terminated the Cheyenne River Sioux Tribe's right to regulate hunting and fishing by non-Indians in areas taken by statute for the Oahe Dam and Reservoir. 508 U.S. 679, 683, 695 (1993). The Tribe had possessed authority to exclude non-Indians from and regulate non-Indians' use of lands taken for the Dam and opened for general public recreation, including hunting and fishing subject to federal and state regulations. *Id.* at 683, 689-90. Justice Thomas's majority opinion (holding that "general principles of 'inherent sovereignty' . . . [did] not enable the Tribe to regulate non-Indian hunting and fishing in the taken area[,]" *id.* at 694) notes that tribal rights were expressly "subject . . . to regulations governing the corresponding use by other [United States] citizens[.]" *Id.* at 679.

Six years later, in the wake of *Mille Lacs*, the Forest Service entered into a memorandum of understanding (MOU) with tribes who obtained recognition of their off-reservation treaty rights in that case. This MOU acknowledged the "existing treaty rights of Tribes to hunt and fish . . . on national forest lands in accord with applicable regulatory authorities of the States or other federal agencies having jurisdiction over such activities." *Memorandum of Understanding Regarding Tribal-USDA-Forest Service Relations on National Forest Lands Within the Territories Ceded in Treaties of 1836, 1837, and 1842* at 1 (June 11, 1999) [hereinafter Tribal-USFS MOU].

While no explicit limitation of the type at issue in *Bourland* appears in Article IV of the 1868 Treaty, the Article IV right should nonetheless be construed as limited by WGFD's regulations to the extent that they were promulgated in order to address mortality factors

relating to tribal and non-tribal hunting under WGFD's statutory authority and in collaboration with the Forest Service.

Should this Court hold that the Crow Tribe's right to hunt off-reservation was not extinguished by Wyoming's statehood, it should still take heed of the language used by the Forest Service's and tribes' common understanding forged months after *Mille Lacs*, and preserve WGFD's management authority.[8]

B. Even if the Crow's right to hunt was not extinguished by Wyoming's statehood, the Bighorn National Forest as well as state lands managed for wildlife are occupied within the meaning of the treaty.

Mille Lacs held that the Crow right to hunt on federal lands was not temporary because the reasoning of *Ward v. Race Horse*, 163 U.S. 504 (1896), would lead to an absurd result where any federal right may be considered temporary "because Congress could terminate [it] at any time by selling the lands." 526 U.S. at 207. But in the case at bar, it is not the disposition of the ceded lands that resulted in the end of the off-reservation treaty hunting right. Rather, the right was extinguished through a series of clear exercises of federal jurisdiction under the Property

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[8] Though *Bourland* preceded *Mille Lacs*, the central holding in *Mille Lacs*—i.e., that "Indian treaty-based usufructuary rights are not inconsistent with state sovereignty over natural resources", 526 U.S. at 208—does not conflict with *Bourland*'s central holding that legislation creating a regime of federal management, which itself preserves state authority, may terminate off-reservation treaty rights without expressly repealing them.

Clause and reservations of state authority under mixed-use legislation enacted over the course of the twentieth century. In terminating the treaty right these actions did not produce an absurd result; they produced an inevitable one.

If the notion that a treaty "itself defines the circumstances under which [its] rights would terminate", *Mille Lacs*, 526 U.S. at 207, applies to the 1868 Treaty, then a plain reading of Article IV of that treaty provides numerous occasions for this Court to find termination.

The 1868 Treaty established tribal hunting rights on "unoccupied lands of the United States." Art. IV, 15 Stat. 650. While the Tenth Circuit held in *Crow Tribe of Indians v. Repsis* that the creation of the Bighorn National Forest occupied the land by making it "no longer available for settlement[,]" 73 F.3d 982, 993 (10th Cir. 1995), Petitioner and the United States as *amicus* argue to the contrary. Br. of Pet'r at 24-30; Br. of United States at 32-40. The Association submits that the federal and state governments occupied the ceded lands within the meaning of the Treaty, but that this Court need not rely solely on *Repsis* to come to such a conclusion.

The principles of multiple use have applied to the National Forest System since its inception. Forest Service Chief Ferdinand Silcox explained them succinctly in 1936:

> [T]he national forests are put, and must be put, to a multiplicity of uses. Often these uses conflict. Sometimes the conflict can be harmonized, sometimes one use must give way.

> Making the forests of greatest possible public service would be wholly impossible without careful planning to govern land use . . .

U.S. FOREST SERV., U.S. DEP'T OF AGRIC., REPORT OF THE CHIEF 2 (1936). A mandate for multiple-use governance came in the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. §§ 528-531, which requires timber, recreation, fish and wildlife, and watershed uses to be planned for on equal statutory footing. § 528. The National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600-1687, sets forth legal standards to guide national and local planning, and under the Sikes Act Extension of 1974, 16 U.S.C. §§ 670g-670o, comprehensive state-federal plans to conserve wildlife in national forests require that state hunting, fishing, and trapping law control. § 670h(b).

Long before MUSYA, the Sikes Extension, and NFMA, however, forest planners were guided by the assumption that "range and timber were the focus of activity in virtually all national forests." Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 24 (1985).

This Court need not rely on the reasoning of *Repsis* to conclude that the creation of the Bighorn National Forest in 1897 was but one step in a process that resulted in the occupation of ceded land. In *Repsis* the Tenth Circuit concluded that because President Cleveland created the Forest pursuant to authority conferred by Congress, 29 Stat. 909-10, and later the Organic Act and MUSYA were enacted, the land became occupied. 73 F.3d at 993.

But the Supreme Court of Idaho took a different path, one that is not foreclosed by *Mille Lacs* and which should still be satisfied by Respondent and the Forest Service here. In *State v. Cutler*, that court noted that the federal government "is not . . . foreclosed from using specific tracts of lands in such a manner that the signatory Indians to treaties would have understood the lands to be claimed, settled or occupied" so as to "exclu[de]" treaty rights. 708 P.2d 853, 856 (Idaho 1985). Roads, campsites, or administrative buildings can be considered to occupy the land. *Id.* at 859.

Not only those structures, but also the various accoutrements of wildlife conservation, must be able to occupy the land within the treaty's meaning.

In 1902 President Theodore Roosevelt's Attorney General Philander C. Knox informed Representative John Lacey that he interpreted the Organic Act of 1897, 30 Stat. 35, to signify that the United States, as "proprietor" of the national forests, could "forbid and punish any and all kinds of trespass upon or injury to the forest reserves, including the trespass of entering upon or using them for the killing, capture, or pursuit of game" so as "not [to] conflict with any State authority" applicable to the killing, capture, or pursuit of game. Letter from Hon. P.C. Knox to Rep. John F. Lacey (Jan. 3, 1902), *reprinted in* H.R. Rep. No. 968, 57th Cong., 1st Sess. 14 (1902).

Conversely, federal grazing policy on the lands that would become national forests was initially permissive of grazing free of fees or regulation. *See Buford v. Houtz*, 133 U.S. 320, 327-28 (1890) ("Everybody used the open unenclosed country, which produced nutritious grasses, as a public common on which their

horses, cattle, hogs and sheep could run and graze" across open areas "[un]separated from the lands owned by the United States".). At this time the federal government's plan was to "transfer ownership of the public domain in small parcels to farmers under the homesteading and preemption laws." 64 OR. L. REV. at 93.

It is not the merits of a permissive grazing policy or a restrictive game policy that are at issue, but rather the understanding, endorsed by this Court and repeatedly evidenced in the early history of forest management, that portions of ceded land that would become National Forests, as well as those that were sold to private landowners, were considered "used" for grazing purposes. Creating the Bighorn National Forest from lands that remained in the public domain, therefore, did not merely make land unavailable for settlement, as Petitioner argues, but set it apart for regulation distinct from the implied license framework then prevailing on private lands. *See Buford*, 133 U.S. at 326. While state agencies regulate game within their borders, *see* pages 3-10 *supra*, such authority must be understood as concurrent with the Forest Service's creation of a framework resulting in the use and occupation ceded lands.

The United States argues in support of Petitioner that the term "occupied" would have been narrowly understood by both parties to be "akin to physical settlement." Br. of United States at 33. But physical settlement has never been understood to be the only activity that indicates or defines the occupation of ceded lands.

The Association again points to canons of interpretation that require express congressional intent and judicial caution in finding preemption of state law. *Ashcroft*, 501 U.S. at 460. Working at cross-purposes with these canons is the requirement for Congress to "clearly express its intent" to terminate treaties. *Mille Lacs*, 526 U.S. at 202. Resolving the conflict between these canons hinges on a somewhat vexing question: Was Congress clearer in the 1868 Treaty (when it failed to elaborate the "right to hunt on the unoccupied lands of the United States") or in the Organic Act and subsequent statutes that repeatedly vested jurisdiction over ceded lands in the Forest Service and reserved primary wildlife authority for the states?

Petitioner maintains that "occup[ation]" at the time of the 1868 Treaty and other treaties was considered synonymous with "settle[ment]". Br. of Pet'r at 33-35 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). But a contemporary legal dictionary notes that "occupation" was also "synonymous with the expression 'subject to the will and control'[.]" 6 JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES 4902 (1904) (citing, *inter alia*, *U.S. v. Rogers*, 23 F. 658, 666 (W.D. Ark. 1885) ("The government of the United States occupies all of its public lands.")). This alternative definition bears heavily on the question of what constitutes a "hunting district" within the meaning of the 1868 Treaty. Petitioner argues that these areas merely "encompassed off-reservation lands where 'the whites' had not settled, for 'the whites' were located on the

opposite side of 'the borders of the hunting districts,' *i.e.*, the ceded land." Br. of Pet'r at 34. What this argument, grounded originally in the definition of "hunting district" found in Article 5 of the Fort Laramie Treaty of 1851, omits is that the regulatory framework of state wildlife management (by WGFD) and federal land management (by the Forest Service) altered the nature of the land within the "hunting districts" so as to occupy them by virtue of the federal government's will and control. *See also* Br. of Resp. at 42-48 (describing the historical understanding of the function of "hunting districts" relative to reservations, diminishing game supply, and statehood).

In *United States v. Dion* this Court established the requirement that "Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." 476 U.S. 734, 740 (1986). Petitioner's brief argues that off-reservation usufructuary rights were not discussed in the lead-up to the passage of the General Revision Act, and cites the Ninth Circuit as rejecting the claim that the President may extinguish treaty rights by declaring a forest reserve. Br. of Pet'r at 39 (citing *Swim v. Bergland*, 696 F.2d 712, 717 (9th Cir. 1983)). But, much as settlement is not exclusively synonymous with occupation, occupation was not at all limited to personal use and habitation, as Petitioner's brief asserts was the sole definition in legal practice at the time. Br. of Pet'r at 36. The courts, Congresses, state officials, and tribal leaders of the nineteenth and twentieth centuries shared a far broader understanding of occupation, and federal and state

officials successfully extinguished the Article IV right through occupation.

* * *

In sum, this Court should affirm the judgment of the District Court of Wyoming for Sheridan County and thereby preserve the valid management authority of wildlife agencies in all states.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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No. 17-532

IN THE

Supreme Court of the United States

CLAYVIN B. HERRERA, PETITIONER

v.

STATE OF WYOMING

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF WYOMING SHERIDAN COUNTY

BRIEF FOR CITIZEN EQUAL RIGHTS FOUNDATION (CERF), MILLE LACS EQUAL RIGHTS FOUNDATION (MERF) AND THE CITY OF WAKHON, MINNESOTA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

The Citizen Equal Rights Foundation ("CERF") was established by the Citizens Equal Rights Alliance ("CERA"). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. Mille Lacs Equal Rights Foundation ("MERF") is a member organization of CERA and is incorporated as a non-profit in Minnesota. Current members of MERF brought the Mille Lacs treaty case, *Mille Lacs Band of Chippewa Indians v. State of Minn.* ("*Mille Lacs*"), 526 U.S. 172 (1999), to the attention of CERA in 1997. The City of Wahkon is on the southeastern shore of Mille Lacs Lake and has been directly affected by the Court's decision in *Mille Lacs*. After the decision in *Mille Lacs*, the State of Minnesota's stipulation agreement and protocols with the Mille Lacs Band effectively removed input from local residents, towns, the county and non-Band members in the rule-making procedures and process for management and use of the lake and its resources. CERF, MERF and the City of Wahkon are primarily writing this *amici curiae* brief to explain why federally reserved treaty interests must be limited by the structure of the Constitution as a matter of federalism to protect the individual rights of the people to self-governance at both the state and national level.[1]

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other

Amici submits this *amici curiae* brief in this case to explain how this Court can apply political accountability federalism as recently adopted in *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461 (2018) to limit the reach of the federal reserved treaty rights. Both Petitioner Herrera and the State of Wyoming have filed blanket consents to the filing of this *amici curiae* brief.

SUMMARY OF THE ARGUMENT

Petitioner Herrera is trying to convince this Court that the *Mille Lacs* Treaty case has implicitly overruled the decision in *Ward v. Race Horse*, 163 U.S. 504 (1896). Amici are writing to explain the effect of the treaty decision in Minnesota and prevent this Court from furthering the erroneous belief that federal reserved interests created before statehood can be balanced with state interests to create workable cooperative management that does not displace primary state jurisdiction over the managed resource. Since the Court's decision in *Mille Lacs*, meeting reports, technical data, communications and rule-making procedures regarding resource management of Mille Lacs Lake have been exclusively between Minnesota Department of Natural Resources and 1837 Ceded Territories Fisheries Committee and closed off to input from persons not a part of the applicable Chippewa Bands. *See* Stipulation, Civil No. 3-94-1226 (D. Minn. 1996), available at

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than *amici curiae*, CERF, its members or its parent CERA's members including Mille Lacs Equal Rights Foundation and the City of Wahkon, or its counsel have made any monetary contribution to the preparation or submission of this brief.

https://files.dnr.state.mn.us/fisheries/largelakes/millelacs/court_decision/stipulation.pdf; *see also* Ex. D-1, Protocol #1: Minnesota 1837 Ceded Territories Fisheries Committee, available at https://files.dnr.state.mn.us/fisheries/largelakes/millelacs/_court_decision/exhibit_d1.pdf. Local governments, businesses that rely on the lake, and local residents that are not tribal members effectively have no voice in the management of the lake.

Petitioner Herrera attempts to argue the *Mille Lacs* case impliedly overrules the decisions in *Crow Tribe v. Repsis*, 116 S. Ct. 1851 (1996) and *Ward v. Race Horse*, 163 U.S. 504 (1896) to challenge his poaching conviction in Wyoming. Amici write this brief to explain that any extension of the reserved rights doctrine against a state after statehood, even when incorporated in a treaty, improperly displaces the primary jurisdiction of the state.

CERA, not understanding why this result was occurring in every case where cooperative management was ordered by this Court, increased its research on the underlying basis of the reserved rights doctrine. *See generally Sturgeon v. Frost*, 136 S. Ct. 1061 (2016). CERA focused on the work of William H. Veeder because he was the primary architect of the major reserved rights water cases in the West, most notably *Arizona v. California*, 373 U.S. 546 (1963). That research has led to documents that demonstrate how and why the reserved rights doctrine cannot be limited by any court. Most recently, CERF submitted a 1930 Federal Irrigation Water Rights Memorandum attached to its amici brief on the already argued case of *Sturgeon v. Frost II*, Docket No. 17-949 to prove this assertion. Amici will explain to this Court how allowing Congress plenary authority over the Indians in *United*

States v. Kagama, 118 U.S. 375 (1886) expanded federal rights reserved to the Indian tribes in treaties before statehood to being perpetually enforceable under the federal reserved rights doctrine. *See United States v. Winans*, 198 U.S. 371 (1906). From this, attorneys for the Department of Justice ("DOJ") created the federal reserved water rights doctrine to challenge the public trust doctrine set in *Lessee of Pollard v. Hagan*, 44 U.S. 212 (1845). *See Winters v. United States*, 207 U.S. 564 (1908).

Amici will attempt to apply the political accountability federalism argument used in *Murphy v. NCAA*, 138 S.Ct. 1461 (2018) to convince this Court that *Ward v. Race Horse* and *Repsis* apply to decide this case. The Court should uphold the *Ward v. Race Horse* precedent that protects the constitutional structure of federalism. This Court took a huge step toward restoring federalism in *Murphy v. NCAA* this past term. Justice Alito, in writing the opinion of the Court, opined that the doctrine of federalism is contradicted by granting Congress plenary authority. Amici agree. The reservation of federal rights in Indian treaties must end at statehood. Accordingly, the Court should uphold the decision of the Tenth Circuit Court of Appeals affirming Wyoming's conviction of Petitioner Herrera.

ARGUMENT

Amici appreciate this Court in *Mille Lacs* attempted to create a balanced decision to protect the reserved interests of the Indian tribes under the treaties negotiated with the United States before statehood, while also protecting the real property and justifiable expectations of the non-Chippewa residents,

local governments and users of the lake. In 1997, CERA, just like this Court, believed that a balance of state and federal interests could be found that would allow state agencies to cooperatively work with federal entities without compromising fundamental state authority. As foreshadowed by Justice Thomas in his dissent in *Mille Lacs*, however, the Court underestimated the federal influence that would be exerted over Minnesota's sovereign authority to manage its natural resources when it acknowledged the treaty interests may have granted "the Chippewa the right to hunt, fish and gather in the ceded territory free of territorial, and later state regulation." 526 U.S. at 1212. Indeed, the continuing stipulation and protocols between Minnesota and the Mille Lacs Band are influenced by the Court's dicta "curtail[ing] the State's ability to regulate hunting, fishing and gathering by the Chippewa in the ceded territories," and have effectively excluded Minnesota's non-Band citizens and local governments from the rule-making procedures and processes involving resource management on the ceded lands. As in *Mille Lacs* and this case, judicial attempts at balanced cooperation have become dominated by federal interests. This case presents the opportunity to correct the *Mille Lacs* decision that assumed reserved federal treaty rights for tribes could be cooperatively managed by state and federal agencies without displacing state sovereignty.

I. INDIAN TREATIES RESERVE RIGHTS THAT BELONGED TO THE UNITED STATES BEFORE STATEHOOD.

A. Background for United States Treaties with the Indian Tribes.

The main reason the nascent United States began to make treaties with the Indian tribes was that Great Britain and the other European countries had begun the practice of making treaties with aboriginal natives as the means to legally justify claiming possession of newly discovered land. These treaties offered proof of seemingly just intentions to the ecclesiastical entities that were after "converting" the natives to Christianity. The actions taken by Spain and the Catholic Church in converting Indians to Christianity were brutal and often amounted to genocide. To Great Britain's credit, its treaty agreements did not require overt promises of conversion to gain protections of the Crown. At the time, these treaties were deemed as being beneficial to the Indians because they were to be "civilized." Conversion to Christianity was one part of being made "civilized." To Britain, the major interest in making treaties with the Indians was to stop their hunting and gathering practices and settle them in a specific limited area where they would learn to farm and grow their own animals, and thus free the extensive lands for settlement by non-Indians.

Finding actual legal citations to this very blunt description for the reason why the United States made treaties with the Indians is not easy. Early cases describe the treaties as beneficial to the Indians and assume imposing European customs was necessary.

Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831). The perspective of the Indians was never addressed. Even in the 1830's, Chief Justice Marshall applies principles of European law to counter what the Congress had done with the Removal Act of 1830, 4 Stat. 411, but ignores the perspective of the Cherokee Nation. It was not until the United States confronted the "civilized" Indian tribes called Pueblo Indians, as recognized in the international peace treaty of Guadalupe Hidalgo, that the real racial prejudice and belief of cultural superiority were made clear in *United States v. Sandoval*, 231 U.S. 28, 39 (1913). The United States finally admitted the real purpose of the Indian treaties and federal Indian policy was to gain title to the land. *United States v. Candelaria*, 271 U.S. 432, 439 (1926).

Indian treaties were also the first mechanism created for reserving important locations of land and mineral lands. Great Britain attempted to reserve important water routes and valuable lands through Indian treaties negotiated for the benefit of aristocratic officers willing to help fund colonization. Chief Justice Marshall masterfully dealt with the Indian title problem this created in *Johnson v. McIntosh*, 21 U.S. 521 (1821), successfully altering the controlling sovereignty from Britain to the United States. Because the United States essentially retained the British legal system, all that was possible was to attempt to adapt the old legal principles into the new American political system. The British system was based on one centralized government that had forced the quasi sovereign governments of Wales and Scotland to cede their traditional powers. It was contrary to the deliberate split of sovereignty incorporated into the Articles of Confederation and the then new Constitution. The issue of whether the States or the

national government had control over the Indian tribes within their borders immediately became a major point of contention with the Declaration of Independence.

To summarize, the Articles of Confederation favored state sovereignty over a centralized national government giving great control over the Indian tribes to the States. The Constitution substantially altered this to give the national government primary authority over the Indian tribes. The treaties and agreements made between States and tribes under the Articles were validated and enforced as preexisting the Constitution. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203-204 Footnote 1(2005). With the adoption of the Constitution, the United States asserted exclusive authority to make treaties with the Indian tribes. Many of these early treaties completely ignored and even contradicted previously-made State treaties and agreements with Indian tribes under the Articles of Confederation in the original thirteen States. As will be discussed in the next section of this brief, the United States still claims to assert the reserved treaty interests of the original States using the very same reasoning it uses for displacing the public trust doctrine that reserved the bed and banks of rivers to the States.

Most of the Indian treaties, including the ones directly relevant to this case, were negotiated between the United States and the Indian tribes in the newly acquired territories after the adoption of the Constitution before the new territory was formed into states. Treaties with the Indian tribes were used to validate the release of Indian title in the same way Great Britain had used the treaties. The young United States used these Indian treaties to cede land to the national government and start the public land process

to encourage settlement. The public lands process was formalized in the Northwest Ordinance of 1787 adopted as the Northwest Ordinance of 1789 as one of the first acts of the first Congress. This process defined how territorial land was opened for settlement and then made into a new State. The Court followed this process in its decision defining the equal footing doctrine as a matter of separation of powers in *Lessee of Pollard v. Hagan*, 44 U.S. 212 (1845) and other old water cases.

Amici fully admit the making of a treaty with an Indian tribe in a territory of the United States was allowed under the Constitution. Negotiating the cessions of land for confirmed rights to continue hunting and fishing across public lands of the United States while an area was a federal territory was well within the authority of Congress and the Executive Branch. Guaranteeing specific reservations of public land to be withdrawn from sale and reserved for Indian tribal use in a federal territory was similarly acceptable. However, when a territory became a State, the State was supposed to assume primary jurisdiction over its territory. Prior to the Civil War, if a sovereignty dispute arose, the dispute was resolved by applying the equal footing doctrine. Federal Indian treaties negotiated in federal territories were enforceable against the United States, but not against a State after statehood. *Ward v. Race Horse*, 163 U.S. 504 (1896). Reserved federal lands for Indian tribes were held in a continuing temporary basis after statehood but were subject to concurrent state jurisdiction.

This law was complicated by the major dispute that arose between the Supreme Court and the elected branches over the Removal Act of 1830. Chief Justice Marshall, a renowned proponent of a strong national government, strongly disagreed with President

Andrew Jackson, a renowned populist, over resolving the conflicting federal and state interests over the Indian tribes in the original thirteen colonies. The Removal Act of 1830, with the 1834 revision to the Trade and Intercourse Act, were the elected branches solution to resolve the dispute by removing Indians to west of the Mississippi River that wished to retain tribal relations and then relinquishing all federal interests and trust responsibilities to the Indians that chose to remain in the East.

General judicial equity power to overrule the Removal Act as unconstitutional was initially rejected in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Chief Justice Marshall refused to exercise judicial review to overturn the denial of an injunction then-sought to preserve the Cherokee Nation's treaty right to occupy territory within the State of Georgia over which the United States's asserted title, as decided in *Johnson v. M'Intosh*, 21 U.S. 571 (1823). Granting the injunction would potentially be tantamount to recognizing "the existence of nations and States [...] possessing [aboriginal] dominion and jurisdiction *paramount to* the Federal and State Constitutions" (emphasis added) 30 U.S. at 49-50. The Court's general judicial equity power was, thereafter, first created in *Worcester v. Georgia*, 31 U.S. 520 (1832). In apparent deference to Justice Johnson's earlier dissent in *Cherokee Nation*, 30 U.S. at 69-70, Chief Justice Marshall proceeded to deliberately oppose the elected branches of government and to declare a federal trust relationship with the Cherokee Nation. Amici is not going to get involved in discussing the Removal policy of 1830 or what led Chief Justice Marshall to make such a bold step. Amici are interested in what this judicially-declared federal Indian trust relationship has become according to the

federal attorneys who manufactured the federal reserved rights doctrine.

The *Worcester* opinion adopted the concepts of protection and trusteeship as more than "a mere moral responsibility." Chief Justice Marshall applied the law of nations as explained in the treatise of contemporary international law expert Emer de Vattel ("Vattel").[2] *See also United States v. Rogers*, 45 U.S. 567, 572 (1846) (referring to them as in "the spirit of humanity and justice"). In *Worcester*, this Court exercised its equity powers to acknowledge such responsibility as having been fulfilled previously by the British Crown in North America, and as having been thereafter inherited and assumed, initially, by the American colonies in the context of "defensive war," and ultimately, by the newly formed United States government following the Revolutionary War. *Worcester*, 31 U.S. at 543-551. Indeed, in *Worcester*, this Court cited Vattel's treatise as the basis for concluding that Indian tribes or bands could be considered 'sovereign' nations or states able to enter into enforceable treaties with independent sovereigns, so long as they retained one facet of sovereignty – political and administrative self-governance. *Rogers*, 45 U.S. at 572; Vattel at 349-354. This Court construed these indicia as evidencing the dependent 'ward' status of the tribal nations to the United States.

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[2] *See* Emir de Vattel, *The Law of Nations; or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, Lieber Collection (Philadelphia: T. & J.W. Johnson, Law Booksellers (1844)); Emir de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Liberty Fund, 2008).

This Court made law in *Worcester v. Georgia* that completely separates the Indians from the rule of law established under the Constitution. In exercising its equity powers to adopt an Indian trust standard based on the law of nations, this Court created and maintains the ultimate right of deciding how to interpret the federal trust relationship with the Indians and tribes. The *Worcester* Court found that Indian treaties executed by the United States are "the supreme law of the land" (Art. VI, Cl. 2), thus intentionally limiting federalism for the benefit of the Indian tribes. This Court in *Worcester* classified the status of the ground occupied by the Cherokee Nation in Georgia as federal Indian country, breaking written safeguards imposed in the Constitution and by statute under domestic law to prevent the war powers from being applied generally against the States and the people.

President Jackson refused to apply the *Worcester* decision and proceeded to treat the lands set aside in Georgia by Indian treaty with the Cherokee Nation as subject to the Removal Act creating the famous Trail of Tears. President Jackson placed the interests of the States and local people over the interests of the Indian tribes in refusing the extra-constitutional trust relationship of *Worcester*. Another way to characterize the position of President Jackson was that the Removal Act was the written policy of Congress and it dominated the Indian treaty made by the United States with the Cherokee Nation despite the ruling in *Worcester*. The pre-Civil War case of *Worcester v. Georgia* laid the groundwork to potentially authorize further federal government activities to displace constitutionally-protected private property rights and State processes in favor of the aboriginal

rights of the Indian tribes as designated in treaties with the United States. [3]

B. The 1871 Indian Policy Ended Treaty Making, but Created Direct Federal Reserved Rights.

After the Civil War, Congress changed federal Indian policy. The 1871 policy ended treaty making with the Indian tribes but preserved the tribal interests made in the Indian treaties. This formally ended the assimilation policy of the Northwest Ordinance and began a much harsher direct war power policy toward the Indians. *See* 25 U.S.C. § 71, 1 Rev. Stat. § 441 and § 442. *See also U.S. v. Lara*, 541 U.S. 193, 201 (2004). The Indian policy of 1871 was based on all Indians and Indian tribes as a race being potential belligerents against the authority of the United States. This change happened because so many Indian tribes raised hostilities during the Civil War. Many Indian tribes formed alliances with the Confederate States. *See Holden v. Joy*, 112 U.S. 94 (1872). This codification of the Reconstruction power over Indians preserved the territorial war powers used to fight the Civil War and to Reconstruct the Southern states following the war. *See* War Powers by William Whiting (43rd edition) p. 470-8. As inherited from the laws of Great Britain, the war powers displace all civil law under the assumption that they are being invoked in a public emergency. The overriding need to protect the physical

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[3] *See e.g., Baley v. United States*, 1-591-L (Fed. Cl. 2017), slip op. at 2, 16-17, 19-21, 45-46, 60-65, 70-74; The Kogan Law Group, P.C., *Summary of Write-ups for Western States Constitutional Rights, LLC* (2016).

integrity of the land and people in a war was necessary to ultimately preserve the very existence of the nation. In other words, invoking the virtually unlimited war powers to fight the Civil War comported with the use of the war powers under British law.

Deliberately preserving the war powers in the 1871 Indian policy when the Civil War ended signaled a major change from what the Framers had tried to design into the constitutional structure to create a new way way to settle land. The Framers were the victims of the territorial war powers of Britain. They intentionally tried to create a new system for domesticating new land areas by applying the principles of the Enlightenment Era. The new system was designed to encourage human progress through self-government and giving everyone the benefit of their own labor. It was far from perfect, as it was the first attempt to overcome the imperialism policy of Great Britain and the other European nations, but the assimilation or "melting pot" ideal – that all persons could succeed if they applied their talents and labor in what we call the "American dream" – was born in the structure of the Constitution that separates the powers of the national government and reserves powers not delegated to the federal government to the States. Part of this structural component was that new States had to be created from any territorial lands, which prevented the national government from concentrating its power to usurp the rights of the People in the states. This structural component was designed to keep law-making as local as could be engineered.

For example, in a modern computer, the main processors are divided into multiple cores. Having multiple processing cores allows the system to access information faster and from different data sources

within the system, which produces a more complete answer that allows the user the full available information to control the system. The States work the same way in the constitutional structure. The constitutional system was intentionally designed to encourage the formation of state and local governments and keep law-making as close to the people, who are the actual data users and controllers, as possible, rather than allotting greater power to the more removed and singular federal government. This means that, when the United States promotes the tribal trust relationship, it is asserting an overriding national interest to short out the constitutional structure that routed the power to the people. The public land process of making territories into States was the linchpin of the constitutional structure to preserve self-governance.

With the adoption of the 1871 Indian policy, the Indians were segregated from the rights of other Americans. Before the 1871 Indian policy, if an Indian left their tribe and chose to live as a non-Indian, they were eligible for all of the rights of any American. They could own private property and participate in their community. After the 1871 Indian policy, even if an Indian left the reservation of territorial land made for his tribe and resided in town as a member of American society, he was deemed to be under the complete authority of Congress as an undomesticated person not capable of exercising the responsibilities of a citizen. Only the federal government could change his status and grant citizenship. *See Elk v. Wilkins*, 112 U.S. 94 (1884). This made the federal power over the Indian tribes perpetual.

In *United States v. Kagama*, 118 U.S. 375, 380 (1886) this Court knew the plenary power was actually the acquiescing of this Court to allow 1871 Indian war

powers to commingle the enumerated federal powers of the Constitution. "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell." *Kagama* at 384. In one statement, the extra-constitutional ruling in *Worcester* was integrated with the 1871 Indian war powers preserved from the Civil War to create plenary power over Indian Affairs. With the decision in *Kagama*, the war powers became directly attached to federal Indian policy, making the as-memorialized interests asserted by the United States on behalf of the Indians in Indian treaties enforceable over structural constitutional safeguards. This meant the Indian treaties could continue in force after statehood and interfere with the equal footing rights of recently admitted States. This was the very issue confronted by this Court in *Ward v. Race Horse*, 163 U.S. 504 (1896).

In *Ward v. Race Horse*, this Court was confronted with whether Indian treaty rights continued after Statehood to prevent the laws of the State against poaching to applying to the accused Native American. In *Ward*, the Court began its analysis by keying on the words in the treaty that it only applied to "unoccupied lands of the United States." *Ward* at 507-508. The Court explained how the treaty language of setting up hunting districts was intended to limit the right to hunt to preserve the peace as white settlement occurred. The Court then proceeded to analyze what the phrase "unoccupied lands" meant under the territorial laws as developed under the constitutional structure that required the Congress to dispose of the territories and create new States. *See* Property Clause, Art IV, Sec. 3, Cl. 2. "To suppose that the words of the treaty intended

to give to the Indian the right to enter into already established States and seek out every portion of unoccupied government land and there exercise the right of hunting, in violation of the municipal law, would be to presume that the treaty was so drawn as to frustrate the very object it had in view." *Id.* at 508. This analysis was a deliberate and correct application of the new land policy built into the structure of the Constitution and a deliberate application of the Equal Footing Doctrine as evidenced by the cite to *Pollard v. Hagan*, 3 How. 212 (1845). *Id.* at 511-512.

Just a year after the decision in *Ward v. Race Horse*, this Court allowed the United States Department of Justice in *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 (1897) to experiment on how to overcome *Pollard's Lessee* and the Equal Footing Doctrine in the Territory of New Mexico. As fully explained to this Court in the merits *amici* brief filed by CERF in *Sturgeon v. Frost II*, Docket No. 17-949, which attached the Federal Irrigation Water Rights memorandum as an appendix, the Department of Justice claimed full title ownership to the land and water in perpetuity against the future State of New Mexico exactly as disallowed by this Court in *Ward v. Race Horse*. 163 U.S. at 511-512.

The first sentence of the federal memorandum – "[t]he United States is the owner of the unappropriated waters in the non-navigable streams in the public land States of the arid West" – set the stage. The United States claimed all of unappropriated waters of the Rio Grande, even though they had argued in this Court that the Rio Grande was a navigable river. But to claim all of the unappropriated waters according to this analysis, the United States also had to claim the Rio Grande was non-navigable. The federal memorandum attempts to

explain how the United States can use either argument, navigable or non-navigable, to gain the same results on federal reserved rights. The purported reason is stated just before the quote from the Rio Grande dam case on the third page: "Even in the States where the appropriation system prevails, the United States continues to hold its land and waters as a riparian proprietor at common law." Not long after federal preemption was created on land, the DOJ thus manipulates it to create the federal reserved rights doctrine on water using an identical legal argument linked to the Indian treaties as federal statutes under federal plenary authority as decided in *Kagama*. *See United States v. Winans*, 198 U.S. 371 (1906). This was quickly followed by the claim that there was implied reservation of water when an Indian reservation was created that could displace state conferred private property water rights. *See Winters v. United States*, 207 U.S. 564 (1908).

Amici aver that, if this Court interprets the territorial power of the Congress/United States as-written in the Constitution and as-applied in *Ward v. Race Horse*, then the rights reserved to the Indians in the Indian treaty terminate at statehood to prevent the general federal territorial war powers from interfering with state sovereignty and local governance. If, on the other hand, this Court accepts the Department of Justice's view that all Indian treaties represent full reserved rights of the United States held on behalf of the Indian tribes under extra-constitutional and direct war power authority preserved from the 1871 Indian policy, then the Indian treaties completely preempt all state functions and authority before and after statehood. Under this second position, the Department of Justice does not abrogate state sovereignty and

treats a State no different than an organized territory, except in name, and thus subject to the plenary authority of Congress and the Executive.

There cannot be plenary authority over the Indian tribes in the national government without supplanting state sovereignty. Just as Ed Kneedler argued in *Sturgeon II*, there is no limit on federal jurisdiction or authority when the federal government is acting for Indian tribes if it has plenary authority to reserve any federal interests at any time either by secretarial order, regulation or court action asserting a new federally-protected interest, like the treaty rights in *Mille Lacs* that had laid dormant for 80 years. Amici do not in any way implicate Indian tribes for this characterization of federal power. While the Department of Justice has not expressly claimed the power to terminate State authority, it has chipped away state authority and jurisdiction case-by-case by claiming that this asserted power to protect the Indian tribes is in the national interest and allegedly benign in its effects on the States and the liberty interests of the People.

II. INDIAN TREATY RIGHTS ARE IRRECONCILABLE WITH STATE SOVEREIGNTY OVER ITS NATURAL RESOURCES

A. The *Mille Lacs* Case is an Anomaly in Indian Law.

The Department of Justice has been fully aware that it has been exercising the full war powers preserved in the 1871 Indian policy against the States as explained in the first section of this brief. It has

intentionally not explained to the Court the basis of federal authority underlying the federal reserved rights doctrine. This was particularly true in the way the Department of Justice briefed the Mille Lacs treaty case. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

It was in the *Mille Lacs* case that the Department of Justice convinced a majority of Justices on this Court that State authority over their natural resources was not impaired or preempted when the state agency was required to enforce federal Indian treaty interests. *Mille Lacs* at 204-205. In the split of five justices to four, Justice O'Connor, writing the majority opinion, actually found that enforcing the federal reserved rights from the Indian treaties entered before statehood did not impair state sovereignty repudiating the earlier decision in *Ward v. Race Horse*. In reality, Justice O'Connor applied the second position discussed above that the federal reserved rights doctrine created from the plenary powers from the 1871 Indian policy and *Worcester v. Georgia* is the dominant federal law and has no limitations. She adopted the argument of the Department of Justice almost exactly as it had been briefed starting with the premise that Indian treaties are to be liberally interpreted in favor of the Indians.

Interpreting the Indian treaties as though the primary intent of the United States when making the treaty was actually protecting the Indian interests is a brilliant argument because it displaces any argument that constitutional structural concerns should be and were the primary concern of the United States when the treaties were negotiated and ratified. As Justice Rehnquist correctly notes in his dissent, this turns the whole question of whether the Indian treaties were

intended to end at statehood completely upside down. *Mille Lacs* at 215. The Indian trust relationship is the dominant extra-constitutional national interest just as the *Worcester* ruling allowed. Justice O'Connor was not usually taken in by the federal manipulations but in Footnote 5 she actually addresses the dissent and chides the Chief Justice for his concerns. *Mille Lacs* at 205.

The Chief Justice also points out other federal manipulations in his dissent by quoting provisions of the various Chippewa treaties to demonstrate their deliberately temporary nature. *Mille Lacs* at 208-210, 219-220. As Chief Justice Rehnquist rightly determines, none of the provisions when written were intended to survive after statehood. Justice Thomas added in dissent how potentially disastrous the *Mille Lacs* decision may be to fundamental principles of federalism. *Mille Lacs* at 221. Even amici CERA in the *Mille Lacs* case did not want to believe that federal Indian policy, which appeared to offer remedy to correct how badly the Chippewa Indian tribes had been treated as the country was settled, was incompatible with state sovereignty. As predicted by Justice Thomas, however, the *Mille Lacs* decision had the effect of curtailing Minnesota's sovereign regulatory authority over its natural resources and has caused other repercussions for federalism too.

The *Mille Lacs* decision appears to be the last decision that the majority of Justices accepted the federal government's arguments without looking behind its intent in making such arguments. Just two years later, the majority openly questioned the intent of federal Indian policy. The major turn occurred in 2001, with the opinion in *Nevada v. Hicks*, 533 U.S. 353 (2001) when a tribal court asserted the right to

entertain a suit from a tribal member accused of off-reservation poaching against the state enforcement officer for civil rights damages. Even if the Court disagrees that *Mille Lacs* can be characterized as overruling *Ward v. Race Horse*, *Nevada v. Hicks* must, in the least, be considered as reconsidering everything decided in *Mille Lacs*. *Nevada v. Hicks* followed *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) basing its analysis on *Montana v. United States*, 450 U.S. 544 (1981) a case not even mentioned in the *Mille Lacs* opinion. *Nevada v. Hicks* required the Court to examine how tribal sovereignty was threatening to dominate state sovereignty and how the Department of Justice was arguing for that conclusion.

Just four years later, this Court heard City of *Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) where the Oneida Nation argued that, as a matter of federal law, it could assert its old treaty rights and unify the rights with reacquired fee title to reestablish tribal sovereignty as if it had never been lost to the State of New York. Justice Ginsburg wrote an opinion explaining why the Court would not allow the unification theory but then instructed the Oneida Nation to use the fee to trust process to displace state sovereignty through the asserted reserved rights of the United States. *Sherrill* at 221. Then came *Carcieri v. Salazar*, 555 U.S. 379 (2009) and the issues of a State-recognized Indian tribe and the deliberate misinterpretation of the intent of Congress in the passing of the Indian Reorganization Act of 1934. This Court attempted to interpret the Indian Reorganization Act as Congress had intended in 1934, which triggered outright opposition from the Department of the Interior and the Department of Justice as to the interpretation of Indian under the act.

See Opinion of the Solicitor M 37029. After *Carcieri v. Salazar*, the Court could no longer ignore that the Department of Justice had its own agenda with federal Indian policy.

Ironically, the very first issue discussed in *Mille Lacs* was the one most manipulated by the Department of Justice. The question of whether the President could end the treaty rights was the ultimate red herring in enforcing a federal Indian policy that is actually based on war powers, as though Indian are still belligerents of war. If the real source of the perpetual treaty rights was revealed, there would be no question that the President as Commander in Chief held the ultimate right to end the treaty rights. But this is where the cleverness of the Department of Justice agenda proves its direct connection to the Nixon Indian policy that CERF usually discusses in its amici briefs to this Court. Richard Nixon found out how the federal reserved rights doctrine really works from William H. Veeder, who was a career lawyer for the Department of Justice. Together, they massively expanded the Department of Justice agenda. But, for some reason that amici have not determined why all of the Nixon Indian policy memoranda omit the Removal Act of 1830 from their history summaries. The Department of Justice has obfuscated the reasons and history of the Removal Act, as it did in *Mille Lacs*, but does not try to omit it from the discussion. Amici raise this because it has become such an odd fact that amici question whether we are all missing something important.

Amici have not spent much time analyzing the *Mille Lacs* decision in-depth because it is undeniably based on federal plenary power and the federal reserved rights doctrine being placed above the federalism structure of the Constitution, as explained in

the first section of this brief. There is enough case law today applying the federal reserved rights doctrine that simply overruling or distinguishing one case will have very little impact. It is the overall choice of whether the law is going to support the Department of Justice position or is going to continue the recent case line and return to the constitutional structure that should control.

B. The Court's Federalism Analysis in *Murphy* Applies to this Case.

In *Murphy v. NCAA*, the majority struck down as unconstitutional provisions in the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. §3701 et seq. that was passed 26 years ago and purported to allow the Congress to prohibit state legislatures from legalizing off site sports betting within respective States. The reasoning of the majority was taken from the federalism argument adopted by the Rehnquist Court in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). The *Murphy* Court changed the prohibition against compelling or coercing a state to administer a federal program into a more defined line—Congress has no power to commandeer any state legislative function that it cannot federally preempt using a direct authority granted to it under the federal Constitution. *Murphy* at 1476. "The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States." 138 S. Ct. at 1475. Justice Alito spent

considerable effort defining appropriate federal preemption in the majority opinion, explaining:

> "The legislative powers granted to Congress are sizable but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority."

138 S. Ct. at 1476.

The anticommandeering doctrine has the potential to be more enforceable than the old equal footing doctrine. The equal footing doctrine relied on the requirement to dispose of the territory and create new states in the Property Clause, Art. IV, Sec. 3, Cl. 2. The United States was allowed to retain territorial land only on a temporary basis in a case that determined states owned the bed and banks of a navigable waterway. *See Lessee of Pollard v. Hagan*, 44 U.S. (3 How.) 212, 221 (1845). The specific requirements set in that case became known as the American public trust doctrine. The main concept was that the federal government could exercise plenary power over a territory but that, upon the formal creation of the territory by Congress, certain powers and ownership over the water would vest in the future state. *Pollard* at 221. This insured that all States would be admitted on equal footing with the existing states. Before the

Civil War Amendments and the end of slavery, this was the only way to enforce the Framers' views that all people are equal before the law. When this Court acquiesced to Congress having continuing plenary authority over Indians, it effectively nullified the equal footing doctrine because Congress no longer had to dispose of any federal territory; it could retain all federal territory indefinitely. This completely contradicts the bedrock principle "that each State is entitled to the sovereignty and jurisdiction over all territory within her limits." *Lessee of Pollard v. Hagan*, 3 How. 212, 228 (1845).

The main principal of the anticommandeering doctrine is that neither the Congress nor any part of the national government has the authority to require a State or State official to act as an agent of the United States to enforce a federal law. *Murphy*, 138 S. Ct. at 1476-1477. As stated in the Federal Irrigation Water Rights memorandum, the plenary authority flips the primary ownership of the water from state to federal and converts the state laws on acquiring a water right into laws passed as agents of the United States to comport to federal laws. The same result occurs when state officials are required to enforce Indian treaty interests that are reserved federal rights. The state officials become agents of the federal government enforcing the federal interests as preemptive rights that can actually displace their state authority. This has occurred with respect to natural resource management of Mille Lacs Lake and other ceded lands after the *Mille Lacs* decision was issued.

The State of Minnesota stipulated to an agreement with protocols for the enforcement of the *Mille Lacs* decision that recognize only the Department of Justice, the seven bands of Chippewa and the

Minnesota Department of Natural Resources as the managers of Mille Lacs Lake. *See* Stipulation, Civil No. 3-94-1226 (D. Minn. 1996), available at https://files.dnr.state.mn.us/fisheries/largelakes/millelacs/court_decision/stipulation.pdf. The Minnesota Department of Natural Resources may collect data and may provide input to fish management within the ceded territory; however, the Band specifically disagreed that the State has authority to resolve disputes regarding the harvestable amount of Walleye. *Id.* at Ex. D-1, Protocol #1: Minnesota 1837 Ceded Territories Fisheries Committee), available at http://files.dnr.state.mn.us/fisheries/largelakes/millelacs/court_decision/exhibit_d1.pdf. No non-Band members have input or right to be heard on the 1837 Ceded Territories Fisheries Commission created for fish management and other state resource decisions affecting the lake either. Currently, only Band members can actually take a Walleye from the lake. Non-Band members cannot take any Walleye and face serious fines for doing so, as enforced by the Minnesota Department of Natural Resources, tribal game wardens and federal officials. Since the ***Mille Lacs*** decision, the Minnesota Department of Natural Resources has thus been an agent for the federal interests. This Court may have thought it was only allowing limited usufructuary rights to be restored to the Bands, but the result has been federal commandeering of the State's management of the lake and other ceded lands, which now threatens to destroy what was once the best Walleye fishery in Minnesota.

III. APPLYING FEDERALISM IN THIS CASE

Amici have spent the majority of this brief discussing the legal realities behind the federal reserved rights doctrine. In application to this case and Petitioner Herrera's requested relief, the issue is much simpler. If this Court meant what it said in *Murphy v. NCAA*, then it should uphold the application of *Crow Tribe v. Repsis*, which retains the validity of *Ward v. Race Horse* against Herrera. Agreeing with Herrera's argument would directly contradict the Court's holding in *Murphy v. NCAA* and the fundamental concept that the constitutional structure includes and protects federalism. If this Court agrees with Wyoming, and amici believe case law requires the Court to do so, then amici respectfully request the Court affirmatively state something to restore the validity of *Ward v. Race Horse* in the majority opinion.

Amici recognize it is more complicated to discuss the question whether the national forest land is occupied or unoccupied. Like the discussion of the presidential order in *Mille Lacs*, however, this issue is a red herring because the Department of Justice can argue the land status any way it wants to under the plenary authority and can always conclude that federal authority preempts state authority just as it has done on water issues. Under the federal public land laws, the declaration of the national forest closes the lands to settlement because the lands become reserved for use as a national forest, which is an occupation of those lands for a particular purpose. Federal public land laws can be, and have been, manipulated by the overriding plenary authority the Department of Justice so claims the federal government has over such lands. Amici hope the Court is truly seeing what the federal reserved

rights that include the Indian treaty rights have done, and may continue to do, to curtail the constitutional structure and federalism.

CONCLUSION

Amici respectfully request the Court uphold the decision of the Tenth Circuit Court of Appeals affirming Wyoming's conviction of Herrera.

Respectfully submitted,

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No. 17-532

In The Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ Of Certiorari To The District Court Of Wyoming, Sheridan County

BRIEF OF THE CROW TRIBE OF INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family.

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae, the Crow Tribe of Indians ("the Tribe" or "Crow"),[2] is a sovereign, federally-recognized Indian tribe with more than 14,000 enrolled citizens. More than 9,000 of those tribal citizens reside on the Crow Indian Reservation ("Reservation"), which is located in southern Montana, adjacent to the Northern Cheyenne Indian Reservation (to the east) and the State of Wyoming ("Wyoming") (to the south). The Tribe is governed by the Crow Tribal General Council, consisting of all adults of the Tribe, through an elected tripartite government with executive, legislative, and judicial branches. Crow Tribe of Indians Const. and Bylaws, art. I (*available at* http://www.crow-nsn.gov/constitutions-and-bylaws.html).

Petitioner Clayvin B. Herrera ("Mr. Herrera") is an enrolled citizen of the Tribe. This case arises from Mr. Herrera's exercise of his off-reservation hunting rights, as expressly reserved by the Tribe in treaties

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[1] The parties have filed blanket consents to the filing of *amicus* briefs in this matter. In accordance with Rule 37.6, *amicus* and its counsel represent that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. This brief is submitted pursuant to Rule 37.3(a), the consent of all parties having been granted.

[2] The name of the Tribe, in its own language, is Apsaalooke. Apsaalooke and Crow are interchangeable and refer to the same indigenous tribal people and its present-day federally-recognized tribal government.

negotiated with the United States, and reaffirmed in negotiated statutes enacted by Congress.

This case is of critical importance to the Tribe. More than 150 years after the Fort Laramie Treaties were executed, subsistence hunting remains vital and necessary to the Tribe's citizens, who hunt both on the Reservation and off-reservation, including in national forest lands adjacent to the Reservation. In the view of the Tribe, the hunting right reserved by the Tribe in the Fort Laramie Treaties, including the 1868 Treaty, has not been abrogated; in particular, the admission of Wyoming to the Union did not abrogate the right, and the creation of the Bighorn National Forest did not render that land "occupied" so as to abrogate the right. In wrongly holding otherwise, the decision below significantly curtails both the lands upon which the Tribe's citizens may exercise the treaty right, and the game available for their subsistence. It is imperative that this Court reverse the decision below.

SUMMARY OF ARGUMENT

The Second Treaty of Fort Laramie executed on May 7, 1868, 15 Stat. 649 ("1868 Treaty"), between the Crow Tribe and the United States established the terms of agreement between two sovereigns, and resulted in a dramatic reduction of the Tribe's land base. Key to that agreement, and to the very significant concessions made by the Tribe therein, was the Tribe's reservation of a continued right to hunt on ceded lands, so

long as certain conditions persisted. The ongoing ability to draw sustenance from those lands was undeniably the understanding held by the Tribe, through the eleven chiefs and headmen who signed the 1868 Treaty, and continues to be the understanding of the elected leadership of the Tribe and Tribal citizens today. Under the legal framework set forth by this Court, that understanding is the basis for interpreting the terms of the 1868 Treaty and its ongoing viability.

The Tribe fully supports the arguments of Mr. Herrera in his brief, and offers this brief to advance two additional arguments. First, the distinctive history of the Crow demonstrates why the Tribe expressly reserved an off-reservation hunting right in the 1868 Treaty, and why that right continues today. The 1868 Treaty, itself, enumerates the only circumstances under which that treaty right might end: the settlement of former Crow lands, the extermination of game, or warfare between the Crow and the United States. However, none of these conditions has come to pass in the Bighorn National Forest. And the condition urged by Wyoming as terminating the Tribe's off-reservation treaty hunting right – Wyoming's statehood – is a condition that this Court, in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), and others have repeatedly rejected, finding it insufficient to terminate a treaty right.

Second, other interpreters of the 1868 Treaty, including the Tribe itself and the United States, have concluded that the Tribe's off-reservation treaty hunting right continues in force, and courts addressing

similar treaties have upheld treaty rights in those agreements. Wyoming, however, believes otherwise and builds its argument upon the bones of two demonstrably wrong cases: *Ward v. Race Horse*, 163 U.S. 504 (1896), and *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995). This Court's decision in *Mille Lacs*, however, provides the correct legal analysis to determine the ongoing viability of precisely the type of treaty provision at issue here. Under that analysis, Article IV of the 1868 Treaty remains in effect, and Wyoming's effort to prevent citizens of the Tribe such as Mr. Herrera from exercising treaty hunting rights in the Big Horn National Forest must fail.

As discussed in greater depth in the brief filed by *amici* McCleary, Pease, Swank, and Wynne, the Tribe's citizens still require access to big game, such as elk, for basic nourishment, and, beyond mere survival, to build a healthy and sustainable future. The 1868 Treaty secures the Tribe's hunting right on unoccupied lands of the United States, including the Bighorn Forest, and Congress has not abrogated that right. Therefore, this Court should reverse the decision below.

HISTORICAL BACKGROUND

1. The traditional homelands of the Crow Tribe around the period of initial contact with non-Indians encompassed an area that now comprises parts of Montana, Wyoming, and the Dakotas. *Montana v. United States*, 450 U.S. 544, 547 (1981); First Treaty of

Fort Laramie with the Crow Tribe, Sept. 17, 1851, 11 Stat. 749 ("1851 Treaty") and 2 Charles Kappler, *Indian Affairs: Laws and Treaties* 594 (1904).[3]

The Bighorn Mountains, including the lands encompassed today by the Bighorn National Forest, historically made up both the geographic and the spiritual heart of Crow territory. Tribal oral history includes the story of Big Metal, a Crow Indian hero whose life was saved by seven bighorn sheep, who in return required that the mountains where they lived and the great river flowing through henceforth be known by their name: Bighorn. Emerson Lee Bull Chief, *Belief Ways of the Apsaalooke: Development of a Culture Through Time and Space* 98-105 (May 2016) (unpublished Ph.D. dissertation, Montana State University) (*available at* https://scholarworks.montana.edu/xmlui/bitstream/handle/1/13778/BullChiefE0816.pdf?sequence=4); Charles Crane Bradley, Jr., *The Handsome People: A History of the Crow Indians and the Whites* 42 (1991). Cloud Peak, in the Wyoming portion of the Bighorn Mountains, holds tremendous spiritual

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[3] The 1851 Treaty identified the Tribe's territory as follows:

> [C]ommencing at the mouth of the Powder River on the Yellowstone; thence up [the] Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth.

1851 Treaty, art. V; Kappler, *supra*, at 595.

significance to the Tribe as a site where many Tribal leaders and heroes fasted. It is also the location where the Tribe believes the Creator gave a sacred tobacco plant to the Tribe after a long migration to show that this region was where they were meant to remain. Bull Chief, *supra*, at 75-76; *see also* Frederick E. Hoxie, *Parading Through History: The Making of the Crow Nation in America, 1805-1935* 84 (1995) ("Hoxie, *Parading*") ("tobacco planting among the Crow was universally associated with the group's special claim to the area immediate surrounding the Bighorn Mountains"). The Bighorn Mountains have remained a source of sustenance – both physical and spiritual – to the Tribe since that very early time, despite the many dramatic changes on the land since then.

2. Prior to contact with non-Indians, the Crow were a nomadic people who depended on buffalo, elk, antelope, and deer for food, shelter, clothing, and many other uses. Frederick E. Hoxie, *The Crow* 24 (1989) ("Hoxie, *The Crow*"); Robert H. Lowie, *The Crow Indians* xiv, 72 (2d ed. 1958). Although the Tribe was best known for hunting buffalo, the Crow have always held elk in high esteem and had many uses for elk meat and other parts of the animal.[4] For the Crow,

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[4] Dresses decorated with the two ivory teeth from each elk are the quintessential Crow Indian woman's formal attire, with a dress decorated by hundreds of ivory elk teeth demonstrating esteem, as well as the hunting prowess of the wearer's spouse and/or relatives. *See* Photographs, Appendix to Crow *Amicus* Brief ("Crow App.") 1a-7a. In 1852, Swiss explorer Rudolph Kurz noted during his visit to the Crow the high value of these elk teeth. Rudolph Kurz, *Journal of Rudolph Friederich Kurz: An Account of*

hunting "was almost an everyday occupation." Thomas Yellowtail, *Yellowtail: Crow Medicine Man and Sun Dance Chief, An Autobiography* 45 (Michael Oren Fitzgerald ed., 1991). Children learned the skills essential for hunting and cleaning game from an early age, and soon were engaged in hunting rabbits and other small game around the camp. Lowie, *supra*, at 35-36, 72. A successful hunt provided much more than meat: "Without it there would have been no horn cups or spoons, no rawhide or leather, hence no robes or tipi covers or containers, not even for the boiling of food." *Id.* at 72, *see also id.* at xv. Little wonder, then, that the hunt carried great religious significance to the Crow. Yellowtail, *supra*, at 37 ("Each major hunt started with the purification of a sweat bath and a prayer. In every case, the offering of a smoke and a prayer was always present. . . . We are given animals for a purpose, and through our knowledge of animals and Nature, we come closer to the Maker of All Things Above.").

3. "In the 19th century, warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851, in which the signatory tribes acknowledged

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His Experiences Among Fur Traders and American Indians on the Mississippi and the Upper Missouri Rivers During the Years 1846 to 1852 80, 251-52 (J.N.B. Hewitt ed., Myrtis Jarrell trans. 1937). ("Among the Crow Indians originated that singular style of trimming, for women doeskin garments, with rows on rows of elk's teeth placed horizontally across front and back . . . one hundred of them cost as much as a pack horse[.]"). Modern day dresses are made using a combination of some real elk teeth and replica elk teeth carved from bone or molded from other materials.

various designated lands as their respective territories." *Montana*, 450 U.S. at 547-48 (citing 1851 Treaty). In delineating their individual territories, however, the 1851 Treaty's signatory tribes "[did] not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 1851 Treaty, art. V; Kappler, *supra*, at 595.

4. The United States and the Tribe met again at Fort Laramie in 1867 to negotiate a new treaty. *See generally* Inst. for the Dev. of Indian Law, *Proceedings of the Great Peace Commission of 1867-1868* (1975) ("*Proceedings*"). On November 12, 1867, Commissioner of Indian Affairs N.G. Taylor explained to the Tribe's representatives the United States' purpose:

> We desire to set apart a tract of your country as a home for yourselves and your children forever, upon which your great Father will not permit the white man to trespass. We wish you to make out a section of country that will suit you for this purpose. When that is set apart, we desire to buy of you the right to use and settle the rest, *leaving to you, however, the right to hunt upon it as long as the game lasts*.

Id. at 86 (emphasis added). Three representatives of the Tribe, Bear's Tooth, Black Foot, and Wolf Bow, each expressed their desire for peace with the United States, but also the importance of maintaining their way of life, including the hunt. *See, e.g.*, *id.* at 88 (quoting Bear's Tooth: "You talk about farming for me and raising stock. I don't like to hear that. I was raised on

game and I would like to live as I was raised. . . . We want to kill our own game and be glad. All of the Crows feel as I do.").[5] The following day, Bear's Tooth told the treaty commissioners that he would bring the United States' offer to the Tribe. *Id.* at 91.

The following spring, the Tribe and the United States executed the Treaty Between the United States of America and the Crow Tribe of Indians, which set forth the boundaries of the Tribe's original Reservation on the southern border of the Montana Territory. 1868 Treaty, art. II. In that treaty, the Tribe reserved for itself "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." *Id.* art. IV.

5. After the signing of the 1868 Treaty and the establishment of the Reservation, the Tribe suffered hunger as the United States failed to deliver rations as promised, and access to big game on the Reservation was limited with the decline of the buffalo herds. Letter from Lewis H. Carpenter, Indian Agent ("Agent Carpenter"), to J.Q. Smith, Comm'r of Indian Affairs

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[5] *See also* Hoxie, *The Crow*, *supra*, at 71 ("Sits in the Middle of the Land, a powerful 70-year-old Mountain Crow leader, spoke for the tribe at these proceedings. Fearing that his people would eventually lose all of their land otherwise, he accepted a substantial reduction in the tribe's territory on the condition that the U.S. government establish a permanent Crow homeland *and guarantee them the right to hunt in unoccupied areas of the Plains.*") (emphasis added).

(Feb. 10, 1877), Crow App. 8a ("These Indians have not the rations called for under the schedule of articles contained in the letter referred to, having only beef and flour, and none of the latter for several weeks prior to the 7th last [sic]."); Letter from H.J. Armstrong, Indian Agent ("Agent Armstrong"), to General Hatch of Fort Custer ("Gen. Hatch") (July 17, 1882), Crow App. 8a ("[T]here is nothing on their reservation to subsist them and our supplies for this agency will subsist them over four months in the year."). Federal representatives, including the U.S. agent on the Reservation, Henry Armstrong, were largely indifferent to the Tribe's plight. Hoxie, *Parading*, *supra*, at 139 ("Even when crop failure left the tribe 'pretty hungry,' Armstrong insisted there was no need for expanded government support, . . . [writing to the Commissioner of Indian Affairs that] 'A little starving will be good for them.'").

As a result, Crow hunters depended on the Article IV off-reservation hunting rights to survive. Most of the Tribe hunted big game "in the sheltered valleys and river bottoms to the south and east" of the Reservation, in the lands that today make up the Bighorn National Forest. *Id.* at 20. In the early 1880s, Armstrong wrote to his superiors in Washington to describe this state of affairs: "[i]t is a mistake . . . to suppose that there is any game on this reservation for the Crows to hunt. There is none and they have to go outside to get elk and deer." Letter from Agent Armstrong to Hon. Hiram Price, Commissioner of Indian Affairs ("Comm'r Price") (Nov. 20, 1883), Crow App. 15a; Hoxie,

Parading, *supra*, at 18, 282; *see also id.* at 115 ("Agent Armstrong reported during the winter of 1883-84 that 'the only way' the tribe had survived in recent years had been by leaving the reservation to hunt.").

Federal officials at the Crow Agency also frequently acknowledged the Tribe's legal right under Article IV of the 1868 Treaty to engage in off-reservation hunting. In 1881, Indian Agent A.R. Keller ("Agent Keller") wrote to Comm'r Price, discussing candidly the 1868 Treaty's provision on off-reservation hunting:

> [T]he Treaty of 1868 not only did not forbid the Indians from hunting off the reserve but went so far as to guarantee them that right, and it will be seen that they have just cause of serious complaints. Of these facts, the Indians are not ignorant and it presents the Government in the light of not only acting unjustly but unlawfully as well. Our Government is certainly too great, too powerful, and too just to merit such a verdict. If we would civilize the Indians, let us by all means be fair and just to him, and ourselves observe the law we would enforce upon him.

Letter from Agent Keller to Comm'r Price (Sept. 3, 1881), Crow App. 17a. The following year, Agent Armstrong wrote to Gen. Hatch, describing the need for the Crows to hunt off-reservation and acknowledging their right to do so:

> [T]here is nothing on their reservation to subsist them[.] . . . By the terms of the 4th article of the treaty of 1868, the Crows have the right

> to hunt upon the unoccupied lands of the United States, so long as game may be found thereon, and the land where the buffalo roam at large can hardly be called occupied, so that I really think that my Indians have the right to go outside their own country after buffalo, although I have been careful not to tell them so, but always the contrary.

Letter from Agent Armstrong to Gen. Hatch (July 17, 1882), Crow App. 12a-13a. Even as Armstrong professed his belief to other U.S. officials that the Crows had a right to hunt off-reservation, he admonished them for doing so. Hoxie, *Parading*, *supra*, at 139 (Armstrong "lectured the tribal headmen to keep their people at home and at work [farming]. He believed those who left the reservation [to hunt] should be jailed and punished.").

6. The continued importance of the Tribe's off-reservation treaty hunting right is demonstrated by the need of the Tribal citizens residing on or near the Reservation for reliable, healthy, and accessible sources of food.[6] Since the execution of the 1868 Treaty, the Tribe has exercised the right to hunt outside of the Reservation on unoccupied lands of the United States,

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[6] Traditional foods and subsistence lifestyles are important to improving the health and well-being of Native Americans. *See generally* Charlene Compher, *The Nutrition Transition in American Indians*, 17 J. Transcultural Nursing 217, 217-22 (2006) ("To improve [American Indian] health and survival, the obesity epidemic must be approached in a concerted, culturally appropriate manner with encouragement of traditional foods and safe opportunities for physical activity."); *see also* Br. for *Amici* McCleary, Pease, Swank, Wynne, and Neelon.

including in the Bighorn National Forest, sometimes encountering opposition from Wyoming state law enforcement. In the early 1970s, Paul Bad Horse, Sr. was cited for hunting on the Wyoming side of the Bighorns by Wyoming state officials. The court dismissed the charges when the U.S. Department of Interior intervened on Mr. Bad Horse's behalf, asserting that he was entitled, under Article IV of the 1868 Treaty, to hunt on unoccupied lands of the United States such as the Bighorn National Forest. Associated Press, *Crow Indian Cites Treaty in Game Rap*, *in* The Daily Plainsman, Oct. 13, 1972 (Huron, S.D.), at 9; *Wyoming Game Charges Dropped for Crow Man*, Char-Koosta News, Jan. 1, 1973 (Pablo, MT), at 6.

Another documented incident of challenge by Wyoming state or local law enforcement to the exercise of the Article IV right occurred in 1989, when Crow citizen Thomas L. Ten Bear was cited by Wyoming State authorities and convicted for killing an elk in the Bighorn National Forest without a state hunting license. *Repsis*, 73 F.3d at 985. The Tribe and Ten Bear unsuccessfully sought declaratory judgment that the Tribe and its citizens had a continuing right to hunt off-reservation on unoccupied lands of the United States, including the Bighorn National Forest. *Id.* at 982. Relying on this Court's opinion in *Race Horse*, the Tenth Circuit concluded that "[t]he Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union." *Repsis*, 73 F.3d at 992. The Tenth Circuit stated in the alternative that, as a result of the creation of the

Bighorn National Forest, the Forest's lands were no longer "unoccupied lands of the United States" upon which the Tribe's citizens could exercise their treaty-guaranteed off-reservation hunting right. *Id.* at 993.

7. The viability of *Ward* and *Repsis* was fatally undermined when this Court decided *Mille Lacs*. 526 U.S. 172 (1999). In rejecting Minnesota's reliance on *Race Horse*, this Court held in *Mille Lacs* that "*Race Horse* rested on a false premise," and clarified that "Indian treaty rights can coexist with state management of natural resources." *Id.* at 204.

8. In light of this repudiation of *Race Horse* (and, by extension, of *Repsis*), and in commemoration of the 145th anniversary of the 1868 Treaty, the Tribe adopted a resolution reaffirming the policy of the Tribe to fully exercise the off-reservation hunting rights reserved by the 1868 Treaty, including in the Bighorn National Forest. Crow Tribe Joint Action Resolution No. 13-09 (May 7, 2013)[7] ("JAR 13-09" or the "Resolution"), https://www.ctlb.org/wp-content/uploads/2015/09/JAR-13-09-Excercising-Off-Reservation-Hunting-Rights.pdf.

9. As set forth in greater detail by Mr. Herrera, *see* Petitioner's Brief for Certiorari at 13-17, in January, 2014, Mr. Herrera went hunting with a group of other tribal citizens in order to provide food for their

[7] The full title of the Resolution is "A Joint Action Resolution of the Crow Tribe to Enact and Declare Official Crow Tribal Policy of Fully Exercising Off-Reservation Hunting Rights Pursuant to the 1868 Fort Laramie Treaty."

families and others in the tribal community. The group sighted a small group of elk on the Reservation; followed it across the Montana-Wyoming state line into the Bighorn National Forest; killed, quartered, and packed three elk; and carried them back to their homes and families. Subsequently, Mr. Herrera was cited for taking antlered big game during a closed-hunting season and for being an accessory to the same. Mr. Herrera moved to dismiss on the grounds that his treaty-guaranteed off-reservation hunting right allowed him to hunt in the Bighorn National Forest. The Wyoming Circuit Court denied the motion, holding that it was "bound by" the Tenth Circuit's decision in *Repsis*. The Wyoming court concluded that this Court's *Mille Lacs* opinion "had no effect on the *Repsis* decision," and barred Mr. Herrera from asserting his treaty right at trial. Mr. Herrera was convicted on both charges, was fined $8,000, given a one-year suspended jail sentence, and had his State of Wyoming hunting privileges suspended for three years. In April 2017, a single judge on the Wyoming District Court, acting in an intermediate appellate capacity, affirmed the Wyoming Circuit Court. Mr. Herrera timely appealed to the Wyoming Supreme Court, which denied review without explanation in a one-page order. Mr. Herrera filed his Petition for Writ of Certiorari to this Court on October 5, 2017. Herrera Pet. for Cert. On June 28, 2018, this Court granted Certiorari.

ARGUMENT

In the Fort Laramie Treaties, the Crow Tribe reserved for its citizens their inherent right to hunt on unoccupied lands within the Tribe's traditional territory, including those lands that today constitute the Bighorn National Forest. That fact is undisputed. And the historical record leaves no question that this off-reservation hunting right remains in effect: the conditions spelled out in the 1868 Fort Laramie Treaty for the continuation of that right remain in place, and no act of Congress has clearly and unequivocally abrogated that right.

I. THE CROW TRIBE'S OFF-RESERVATION HUNTING RIGHT IS CLEARLY RESERVED IN THE FORT LARAMIE TREATIES.

There is no question that the Tribe, in both the 1851 Treaty and the 1868 Treaty, reserved its right to hunt on lands outside the present-day Reservation. 1851 Treaty and Kappler, *supra*, 594; 1868 Treaty; *see also United States v. Winans*, 198 U.S. 371 (1905) (describing treaties as "not a grant of right to the Indians, but a grant of rights from them – a reservation of those not granted"). The right retained in the 1851 Treaty was sweeping: the Crow (and other signatory Tribes) "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 1851 Treaty and Kappler, *supra*, 595; *Montana*, 450 U.S. at 548. The 1868 Treaty provides that the Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be

found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV. Even Wyoming does not dispute that the 1868 Treaty established this right. Resp't Opp. for Cert. 3.

II. THE CROW TRIBE'S OFF-RESERVATION HUNTING RIGHT CONTINUES IN FORCE TODAY.

A. The Treaty Conditions Continue to this Day.

The 1868 Treaty provides that the Tribe's off-reservation hunting right persists so long as four conditions are met: (1) the United States retains the lands; (2) the lands are unoccupied; (3) game may be found on those lands; and (4) there is peace between the United States and the Tribe. 1868 Treaty, art. IV. Each of those conditions continues to this day.

1. The United States retains unoccupied lands, including the Bighorn National Forest, *see* Pet'r Br. for Cert. 21-24, within the territory ceded by the Tribe. The 1868 Treaty provides that citizens of the Tribe may hunt on "unoccupied lands of the United States," but does not define the term "unoccupied." 1868 Treaty, art. IV. As Petitioner has explained, however, the text of the 1868 Treaty demonstrates that both the Tribe and the United States understood "unoccupied" to mean not settled by non-Indians. *See* Pet'r Br. for Cert. 33-34. That understanding is consistent with the negotiations between Commissioner Taylor and the Tribe's

representatives, where the parties discussed how "the white people are rapidly increasing . . . and occupying all the valuable lands" – thereby suggesting that the Tribe would have deemed lands lacking "the white people" and white settlements to be "unoccupied lands." Proceedings at 86; *see also* Pet'r Br. for Cert. 34-35. The historical record similarly shows that the United States understood the Crow's treaty hunting right to extend to those lands not "occupied by settlements," as demonstrated by Sen. James Harlan's explanation on the floor of the Senate:

> There is, I think, in the same treaty, a provision permitting these Indians to hunt, so long as they can do so without interfering with the settlements. So long as outside lands, outside of the reservation, may not be occupied by settlements, and may be occupied by game, they may hunt the game.

Cong. Globe, 40th Cong., 3d Sess. 1348 (1869); *see also State v. Cutler*, 708 P.2d 853, 863 (Idaho 1985) (quoting Sen. Harlan).[8] Thus, there is no support in the Treaty or the historical record for Wyoming's argument that the creation of the Bighorn National Forest resulted in the "occupation" of the Forest and the termination of

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[8] The fact that the Crow continued to hunt off-reservation in ceded lands throughout this period is further evidence of their understanding, as is the continued off-reservation hunting that continues through the present day. *See supra*, pp. 8-13. In addition, JAR 13-09, discussed in further detail at III, *infra*, states the current understanding of the Tribe as to the import and duration of Article IV of the 1868 Treaty, and is informed by the views of the Tribe's leadership, passed through several generations.

the Tribe's off-reservation hunting right on those lands.

2. Game is found on those lands – in fact, elk in particular are abundant. Wyoming's own Game & Fish Department reports that elk are abundant in the region. *Wyoming Statewide Hunting Season Forecast Revised 9-12-2017*, Wyo. Game & Fish Dep't, https://wgfd.wyo.gov/Hunting/Wyoming-Hunting-Forecast (last visited Sept. 5, 2018) (elk populations in Sheridan Region, which encompasses Bighorn National Forest, "exceed[] management objectives").

3. Finally, there has been peace between the United States and the Tribe since the 1868 Treaty was executed. In fact, the Crow have been staunch allies of the United States both before and after that Treaty.

In 1825, the Tribe and the United States entered into treaty "[f]or the purpose of perpetuating the friendship which has heretofore existed" between the parties. Treaty with the Crow Tribe, Aug. 4, 1825, 7 Stat. 266. In the 1860s, the Crow refused entreaties to join Red Cloud's war against the United States. Hoxie, *Parading*, *supra*, 89. In the 1870s, the Tribe allied with the United States against the Sioux, Cheyenne, and Arapaho. As the Crow Chief Plenty-Coups explained, the Tribe provided scouts for the United States at the Little Bighorn for the purpose of preserving peace with the United States and preserving their territorial rights: "Our decision was reached, not because we loved the white man who was already crowding other tribes into our country, or because we hated the Sioux,

Cheyenne, and Arapahoe, but because we plainly saw that this course was the only one which might save our beautiful country for us." Frank B. Linderman, *Plenty-Coups: Chief of the Crows* 85 (new ed. 2002); *see also* Peter Nabokov, *Two Leggings: The Making of a Crow Warrior* 187 (1967) ("We helped the white man so we could own our land in peace.").

The decision below failed to examine these express conditions in the 1868 Treaty which continue to this day, and instead concluded without any evidence that the treaty "clearly contemplated" that the Tribe's treaty-guaranteed off-reservation hunting right would terminate upon Wyoming's admission to the Union or the creation of the Bighorn National Forest.

B. Congress Has Not Abrogated the Tribe's Off-Reservation Hunting Right.

The decision below identifies no act of Congress that clearly and expressly abrogates the Tribe's off-reservation treaty hunting right, because there is no such act of Congress. "A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). And once an Indian tribe reserves by treaty a right for itself, only Congress may abrogate that right, and Congress must clearly express its intent to do so. *Mille Lacs*, 526 U.S. at 202; *see also United States v. Dion*, 476 U.S. 734, 738 (1986) ("We have required that Congress' intention to

abrogate Indian treaty rights be clear and plain."); *Fishing Vessel*, 443 U.S. at 690 ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights."); *cf. Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968) ("While the power to abrogate [hunting and fishing] rights exists, the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress" (internal quotation and citations omitted)).[9] Moreover, "[t]here must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" *Mille Lacs*, 526 U.S. at 202-03 (quoting *Dion*, 476 U.S. at 740).[10]

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[9] Although each of the preceding cases concerned tribal hunting and fishing rights, this Court has applied this "clear intent" standard to any number of contexts, including reservation diminishment, *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016) ("Only Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear." (internal quotation and citation omitted)); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."); and tribal sovereign immunity, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014) ("'To abrogate [tribal] immunity, Congress must 'unequivocally' express that purpose'" (quoting *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting, in turn, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978))).

[10] The cases cited are consistent with current international legal standards on indigenous peoples' rights, including treaty rights. *See, e.g.*, U.N. Decl. on the Rights of Indigenous Peoples,

Rather than identifying the requisite "clear[] express[ion]" of Congress to abrogate the Tribe's off-reservation hunting right, the decision below merely cites *Repsis* for the proposition that the Tribe's off-reservation hunting right "was repealed by the act of admitting Wyoming into the Union," Cert. Pet. App. B 22 (quoting *Repsis*, 73 F.3d at 992). *Repsis*, in turn, identified no provision of the act admitting Wyoming in which Congress "clearly expressed its intent" to abrogate the Tribe's off-reservation hunting right, but instead relied only upon this Court's decision in *Race Horse*, 163 U.S. 504, that the equal footing doctrine created an "irreconcilable" conflict between the Tribe's off-reservation hunting right and the "power of a State to control and regulate the taking of game." *Repsis*, 73 F.3d at 990 (quoting *Race Horse*, 163 U.S. at 507, 514). In *Mille Lacs*, this court expressly repudiated that aspect of *Race Horse* (and, necessarily, of *Repsis*):

> But *Race Horse* rested on a false premise. As this Court's subsequent cases have made clear, an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State. Rather, Indian

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art. 26.3 (states are to recognize, respect, and protect indigenous rights to lands, territories, and resources traditionally owned, occupied, or otherwise used or acquired by indigenous peoples), art. 46.2 (rights of indigenous peoples are not lightly to be limited). The United States has stated its support for these standards. *See* U.S. Dep't of State, *Announcement of United States Support for the United Nations Declaration on the Rights of Indigenous Peoples* (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm.

> treaty rights can coexist with state management of natural resources.

Mille Lacs, 526 U.S. at 204 (internal citations omitted); *see also State v. Buchanan*, 978 P.2d 1070, 1082-83 (Wash. 1999) (noting the reliance of *Repsis* on *Race Horse*, and that "the United States Supreme Court effectively overruled *Race Horse* in [*Mille Lacs*]").

C. The Tribe's Treaty Right is Entirely Consistent with Wyoming Statehood.

Contrary to Wyoming's assertions, the Tribe's off-reservation treaty hunting right is entirely consistent with Wyoming's statehood. The act admitting Wyoming to the Union did not mention, let alone abrogate, the Tribe's off-reservation treaty right. *See generally* an act to provide for the admission of the State of Wyoming into the Union, and for other purposes, Act of July 10, 1890, 26 Stat. 222.[11] Moreover, in the years following the admission of Wyoming to the Union, Congress expressly reaffirmed that the Tribe's treaties continued in full force and effect. Some eight months after Wyoming was admitted to the Union, in a negotiated agreement enacted as part of an Indian appropriations act, Congress expressly provided that "all

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[11] Nor did President Cleveland's proclamation creating the Bighorn National Forest. *See generally* Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897). Moreover, as Petitioner demonstrates, the President could not have abrogated the Tribe's treaty rights unless expressly authorized to do so by Congress, which he was not. Pet. Br. 32-40.

existing provisions" of the 1868 Treaty "shall continue in force." 26 Stat. at 1042 (1891).

Both the State of Wyoming's argument and the lower court's conclusion are at odds with how this Court analyzes Indian treaties. A guiding principle of this Court's Indian law jurisprudence is that "we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Mille Lacs*, 526 U.S. at 196 (citing *Fishing Vessel*, 443 U.S. at 675-76; *Winans*, 198 U.S. at 380-81); *see also United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyo.*, 304 U.S. 111, 116 (1938) (treaties "are not to be interpreted narrowly, . . . but are to be construed in the sense in which naturally the Indians would understand them"); *Worcester v. Georgia*, 31 U.S. 515, 551-54 (1832) (interpreting treaty as the Cherokee would have understood its meaning).

Neither the decision below, nor the *Repsis* decision upon which it relies, contains any indication that the Tribe, when it entered the 1868 Treaty, understood that that treaty "clearly contemplated" the expiration of the off-reservation hunting right upon Wyoming's admission to the Union. The decision below merely (and erroneously) concludes that *Repsis* remains good law. Cert. Pet. App. B 24 ("*Mille Lacs* did not overturn *Race Horse* or *Repsis*."). And it wrongly affirmed the concept that a court interpreting a treaty must determine if the rights reserved in the treaty were intended to be perpetual or if they were intended to expire upon the happening of a "clearly contemplated event"; *id.* at 24 n.6 ("the *Mille Lacs* Court held that courts should

look to see whether the rights granted in a treaty were intended to terminate upon the happening of a clearly contemplated event, as the *Race Horse* court had done.").

The *Repsis* court acknowledged its obligation to interpret the 1868 Treaty as the Tribe would have understood it. 73 F.3d at 992 (collecting cases). Nevertheless, *Repsis* concluded that Wyoming's statehood constituted the "clearly contemplated event" that terminated the Tribe's treaty-guaranteed off-reservation hunting right, while pointing to no evidence whatsoever that the Tribe understood that its hunting right would terminate upon statehood (of Wyoming or any other state). *See generally id.* In the alternative, the *Repsis* court stated that the creation of the Bighorn National Forest rendered the lands contained therein no longer "unoccupied" and, therefore, extinguished the Tribe's treaty-guaranteed off-reservation hunting right on those lands. *Id.* at 986.

The historical record demonstrates, instead, that both the Tribe *and* the United States understood that the Tribe would be allowed to hunt on ceded lands so long as there was game to hunt, and so long as doing so would not interfere with non-Indian settlement. In welcoming the Tribe to the negotiations, Commissioner Taylor told the Tribe's representatives that the United States hoped to settle most of the Tribe's territory, but that the Tribe nonetheless would retain "the right to hunt upon it as long as the game lasts." *Proceedings* at 86. In response, all three of the Tribe's representatives emphasized the importance of hunting to the Tribe's

way of life. *Id.* at 88-89. The following day, Commissioner Taylor reassured the Tribe's representatives that even upon accepting a reservation, "[y]ou will still be free to hunt as you are now." *Id.* at 90. Thus, both the Tribe and the United States understood that the Tribe, even if it accepted a reservation, intended to preserve its right to hunt throughout its territory.

Ultimately, the 1868 Treaty provided that the Tribe could continue to hunt "on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV.

D. The Bighorn National Forest is Unoccupied, and is Subject to the Tribe's Off-Reservation Hunting Right.[12]

Congress enacted the Act of March 3, 1891 to repeal timber-culture laws, and for other purposes (commonly referred to as the "Forest Reserve Act"), well over a year after Wyoming's statehood, in which it both authorized the Executive to create National Forests and expressly provided "[t]hat nothing in this act shall change, repeal or modify any agreements or treaties made with any Indian tribes for the disposal of their

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[12] For a more detailed examination of the history of the National Forests generally, and of the Bighorn National Forest specifically, in relation to Indian treaty hunting rights, *see generally* Br. of *Amici Curiae* Natural Resource Law Professor in Support of Petitioner.

lands, or of land ceded to the United States to be disposed of for the benefit of such tribes. . . ." An act to repeal timber culture laws, and for other purposes, 26 Stat. 1095, 1099 § 10 (1891). Another negotiated agreement enacted by Congress in 1904 provided that "existing provisions of all former treaties with the Crow tribe [sic] of Indians not inconsistent with the provisions of this agreement are hereby continued in force and effect." An act to ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect, Act of April 27, 1904, 33 Stat. 352, 355.[13] Far from containing express language abrogating the Tribe's Article IV hunting right, Congress acted to preserve it.

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[13] Similarly, neither the decision below, nor the opinion in *Repsis* upon which the decision below relied, identifies any statute "clearly expressing [Congress's] intent" to remove the Big Horn National Forest from the category of "unoccupied lands of the United States." Although the *Repsis* court noted that "Congress created the Big Horn National Forest and expressly mandated that the national forest lands be managed and regulated for the specific purposes of improving and protecting the forest, securing favorable water flows, and furnishing a continuous supply of timber," 73 F.3d at 993 (citing 16 U.S.C. § 475), it identified no evidence that Congress considered the conflict between these purposes and the Tribe's exercise of its treaty rights and resolved the conflict by abrogating the treaty, as required by *Mille Lacs*. 526 U.S. at 202-03. As Petitioner demonstrates, the creation of the Big Horn National Forest did not, in fact, abrogate the Tribe's off-reservation hunting right on those lands. Pet'r Br. for Cert. 21-24.

III. TRIBAL OFF-RESERVATION HUNTING RIGHTS ARE NOT IMPLIEDLY ABROGATED AND HAVE CONTINUING VIABILITY.

The construction of Indian treaties is a federal question, upon which this Court has the final say. *Fishing Vessel*, 443 U.S. at 693. However, this Court has also recognized that it benefits from the considered decisions of other interpreters of federal law; and when the federal law in question concerns Indian interests, Indian tribes are among those interpreters. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (requiring exhaustion of tribal court remedies before presenting federal courts with federal question of tribal court jurisdiction over non-Indians). On the question before this Court, every interpreter except Wyoming has concluded that the off-reservation hunting right described in the 1868 Treaty remains intact.

A. The Tribe and the United States Recognize that the Tribe's Treaty Right Continues in the Bighorn National Forest.

"In interpreting any treaty, '[t]he opinions of our sister signatories' . . . are 'entitled to considerable weight.'" *Abbott v. Abbott*, 560 U.S. 1, 16 (2010) (citing *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999)). Here, the Tribe has concluded that the off-reservation hunting right reserved in the 1868 Treaty remains intact. On May 7, 2013, the Tribe's Executive and Legislative Branches enacted Joint Action Resolutions, concluding that the right continues in full

force and effect to the present day, and indicating the contemporary understanding of the Tribe as to the 1868 Treaty, informed by the lengthy history of the Tribe and its citizens living pursuant to and within the terms of those Treaties. Just as the Court gives weight to the federal executive branch's interpretation of a treaty's terms, the interpretation of a tribal executive branch also merits consideration. *See Abbott*, 560 U.S. at 15 ("It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'") (citing *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) ("deferring to the Executive's interpretation of a treaty as memorialized in a brief before this Court")).

Moreover, in this case, both the United States and the Tribe agree that Article IV of the 1868 Treaty remains in effect, and that Mr. Herrera was exercising his valid right, as a citizen of the Tribe, to hunt in the Bighorn National Forest. *See generally* U.S. *Amicus* Br. (in Support of Pet'r). Thus, in this instance, the parties' understanding of the treaty is entitled to particular deference. *Sumimoto*, 475 U.S. at 185 ("When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.").

The Tribe, through its contemporary form of elected government, continues to identify the centrality of the Bighorn Mountain region, including the Bighorn National Forest and the game therein, to Crow

lifeways. In JAR 13-09, the Tribe expressed its conclusion that "the United States Congress has never abrogated" the Tribe's off-reservation treaty hunting right. JAR 13-09, cl. 8. The Resolution resolves that "[t]he policy of the Crow Tribe shall be to exercise fully its treaty right to hunt on all unoccupied lands of the United States which are located within the traditional Crow homeland as set out in the 1851 Fort Laramie Treaty, along with all such lands as located in traditional Crow territory according to tribal oral history." JAR 13-09 § 1. The Resolution further authorizes the Crow Tribe Executive Branch to "negotiate with any and all federal and state governmental authorities regarding any terms or conditions the Legislature should consider in the adoption of treaty hunting regulations in the Tribal Fish and Game Code." JAR 13-09 § 6. Thus, as a matter of Crow Tribal law, the Crow Tribe is authorized and stands ready to work with the State of Wyoming, as well as other state and federal governmental entities, to determine mutually beneficial ways of regulating tribal treaty hunting, and common-sense solutions for managing elk and other game that ranges along the border between the Crow Indian Reservation and the Big Horn National Forest in Wyoming.

Also on May 7, 2013, the Crow Legislative Branch enacted Joint Action Resolution No. 13-12 ("JAR 13-12," https://www.ctlb.org/wp-content/uploads/2015/09/JAR-13-12-Treaty-Commemoration-Days.pdf),[14] recognizing

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[14] The full title of JAR No. 13-12 is "A Joint Action Resolution of the Crow Tribe to Establish Crow National Days of Commemoration Honoring the Signing of the 1825 Treaty With the United

the eleven chiefs and headmen who were signatories to the 1868 Fort Laramie Treaty and establishing September 17 of each year as the Crow National Day of Commemoration Honoring the Signing of Treaties with the United States, to be observed as a holiday by the Crow Tribal government and employees. JAR 13-12 at 2.

The historical record demonstrates the importance of the off-reservation treaty hunting right to the Crow, not only as a matter of subsistence, but also as an expression of Crow culture and religion. *See supra* pp. 6-12; n.4, 6. Through JAR 13-09 and JAR 13-12, modern-day Crow Tribal law underscores the contemporary importance of the treaties, in particular the off-reservation hunting right preserved in Article IV of the 1868 Treaty, and further demonstrates how the Crow Tribe, as a signatory to that treaty, interprets that right today.

Because the State of Wyoming has repeatedly and unflinchingly taken the position that the Tribe, and thus individual Tribal citizens, have no right to hunt off-reservation pursuant to Article IV of the 1868 Treaty, the Crow Tribe today continues to look to the United States to uphold the terms of those agreements which are protected by the United States Constitution. These rights remain fundamental to the survival and well-being of the Tribe and its citizens – past, present, and future.

States, the 1851 Fort Laramie Treaty, and the 1868 Fort Laramie Treaty."

B. State Courts, Except for Wyoming's, Recognize the Continuing Applicability of Off-Reservation Treaty Hunting Rights.

Although no state, aside from Wyoming, has seen its courts rule on the continued vitality of the Crow Tribe's off-reservation treaty hunting right, a number of state courts have upheld the validity of tribal off-reservation hunting rights arising from similar treaties.

In *State v. Tinno*, the Idaho Supreme Court affirmed the continuing validity of the Shoshone-Bannock Tribes' off-reservation hunting and fishing rights. 497 P.2d 1386 (Idaho 1972). Gerald Cleo Tinno, a Shoshone-Bannock Tribes citizen, was charged with taking fish out of season in the Challis National Forest. *Id.* at 1387, 1391. Interpreting language in the Shoshone-Bannock Tribes' treaty that is identical to that in the Crow Tribe's 1868 Treaty,[15] the court concluded that "the mere passage of time has not eroded the rights guaranteed by a solemn treaty that both sides pledged on their honor to uphold." *Id.* at 1393.[16]

In *State v. Stasso*, the Montana Supreme Court affirmed the continuing vitality of the Confederated Salish and Kootenai Tribes' ("CSKT") off-reservation

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[15] *Compare* 1868 Treaty, art. IV; *with* Treaty with the Eastern Band of Shoshonees and the Bannock Tribe of Indians, art. IV, 15 Stat. 673, 674-75 (1868).

[16] The court further held that the State of Idaho had failed to demonstrate any conservation necessity that would justify its regulation of the Tribes' off-reservation hunting and fishing. *Id.* at 1393-94.

hunting and fishing rights. 563 P.2d 562 (Mont. 1977). Lasso Stasso, a CSKT citizen, was charged with killing deer out of season on U.S. Forest Service lands outside of the CSKT reservation. *Id.* at 562-63. The Treaty between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, 12 Stat. 975 (1855), at Article III "secured to said Indians," *inter alia*, "the privilege of hunting . . . upon open and unclaimed lands." *Id.* at 976. The State of Montana argued that the Montana Territorial Act had abrogated Article III. *Stasso*, 563 P.2d at 564. The Stasso court rejected that argument, and further held that "the National Forest lands involved herein are open and unclaimed lands" for purposes of the treaty. *Id.* at 565.

And in *State v. Miller*, the Washington Supreme Court reversed the convictions of two citizens of the Skokomish Indian Tribe for taking elk out of season in the Olympic National Forest. 689 P.2d 81 (Wash. 1984). In the Treaty between the United States of America and the S'Klallam Indians, 12 Stat. 933 (1859), the Indians in Article III reserved for themselves, *inter alia*, "the privilege of hunting . . . on open and unclaimed lands." *Id.* at 934. The *Miller* court concluded that this right still had purchase, and that the trial court erred in requiring the defendants to prove that the state's regulations were not necessary for conservation, when the burden should have been on the state to demonstrate the necessity of its regulations and of enforcing them against Indians exercising treaty rights. 689 P.2d at 82, 85-87.

While none of these cases specifically concerned the Crow Tribe's off-reservation hunting right, each concerned a tribal off-reservation hunting right articulated in terms identical or similar to that of the Tribe's 1868 Treaty, and each concerned a state's attempt to regulate such off-reservation hunting on National Forest lands. And in each case, the appropriate state court found the tribal right was preserved from treaty days to the present. Against the weight of these cases, and of the Crow Tribe's JAR 13-09, stands only the decision below – an outlier built upon the demonstrably wrong decisions in *Repsis* and *Race Horse*. The decision below cannot stand.

CONCLUSION

The Crow Tribe has served as an unflinching ally of the United States. Crow Tribal citizens have fought and died side-by-side with, and as members of, the United States Military, while at the same time fighting to preserve the rights lawfully retained in exchange for the peaceful cession of most of our lands. One of those rights, expressly reserved by the Crow in the 1868 Treaty, is the right to hunt on unoccupied lands of the United States, such as the Bighorn National Forest. No act of Congress has abrogated that right; and the United States "is certainly too great, too powerful, and too just to merit such a verdict." Letter from Agent Keller to Comm'r Price, *supra*.

The judgment of the Wyoming district court should be reversed.

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No. 17-532

IN THE
Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

ON WRIT OF CERTIORARI TO
THE DISTRICT COURT OF WYOMING,
SHERIDAN COUNTY

BRIEF FOR THE EASTERN SHOSHONE TRIBE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Eastern Shoshone Tribe ("Tribe") is a federally recognized tribe, residing in the Wind River Reservation in Wyoming. 83 Fed. Reg. 4235, 4236 (Jan. 30, 2018). For the last 150 years, the Tribe has exercised treaty rights in accordance with the Second Treaty of Fort Bridger, 15 Stat. 673 (1868), which contains language nearly identical to the language in the Treaty of May 7, 1868 between the United States and the Crow Tribe, 15 Stat. 649 ("Crow Treaty"). By virtue of the similarity of their treaties, the Tribe has an interest in ensuring that the Crow Treaty is properly interpreted and that off-reservation hunting rights are not impliedly abrogated.

SUMMARY OF ARGUMENT

The Wyoming District Court erred in finding that the Crow Tribe's off-reservation hunting rights—guaranteed under the Treaty of May 7, 1868—were extinguished upon Wyoming's statehood or, alternatively, by the establishment of the Bighorn National Forest in 1897. Neither event had the force to abrogate the express treaty right to hunt on the unoccupied lands of the United States.

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[1] All parties to this litigation have consented to this *amicus curiae* brief, and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and their counsel made a monetary contribution to the preparation or submission of this brief.

In this Court's many cases involving Indian treaty interpretation lies an important guiding principle—that the federal government has a trust responsibility to Indian tribes. That is, the reason treaties are interpreted liberally in favor of Indians is more than just the common-law rule of *contra proferentem*, i.e., "the general maxim that a contract should be construed most strongly against the drafter." *See United States v. Seckinger*, 397 U.S. 203, 210 (1970). Rather, it is the upshot of the federal government's treatment of Indian tribes up to, including, and in the wake of, the treaty era.

When the federal government entered into treaties with the Indian tribes, it was dealing with sovereigns that this Court has characterized as "domestic dependent nations." *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). That is, though tribes were acknowledged as "distinct political societ[ies], separated from others [and] capable of managing [their] own affairs," *see id.* at 16, they were also considered "dependent" insofar as they relied upon the "protection and good faith" of their guardian—the United States, *see Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). Of course, this "protection" had a literal component insofar as it involved the actual physical protection of tribal members against potentially violent non-Indian settlers. But it also had a broader, practical, component insofar as it included assurances relating to their general socioeconomic well-being. *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1505–08 (1994).

Out of this well-established guardian–ward relationship has developed a commonsense framework for interpreting Indian treaties. Specifically, Indian treaties are to be interpreted "in the sense in which naturally the Indians would understand them." *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938). And if any treaty terms are ambiguous, those ambiguities are to be resolved in favor of the "wards of the nation," i.e., the tribes. *See Carpenter*, 280 U.S. at 367; *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973). Furthermore, this rationale extends to analysis of whether a subsequent federal law has *extinguished* a treaty right. Of course, it is axiomatic that Congress—having plenary power over Indian affairs—has the authority to unilaterally abrogate treaty rights. *See Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). But to do so it must clearly express that intent. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). There must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 740 (1986). After all, "Indian treaty rights are too fundamental to be easily cast aside." *Id.* at 738.

The lower court's decision effectively turns these basic principles of Indian treaty interpretation on their head. Rather than requiring an express abrogation of the Crow Tribe's off-reservation hunting rights, the court simply adopted a since-repudiated methodology that accords undue weight

to a state's admission to the Union—an approach taken from *Ward v. Race Horse*, 163 U.S. 504 (1896), that was overruled by this Court in the *Mille Lacs* case. But aside from the application of a clearly discredited precedent, the lower court erred by effectively disregarding the doctrinal underpinning of the canon of construction favoring tribal interests: the trust relationship between the federal government and Indian tribes.

The trust responsibility of the federal government to Indian tribes is well-established in this Court's case law, having roots in some of the earliest Indian law decisions in the U.S. Reports. At the most fundamental level, this trust relationship means that the United States is to act as a guardian of tribal sovereignty with a duty to safeguard the health and well-being of tribal members. It is a duty that has been reaffirmed in countless statutes, executive orders, and treaties—including the Crow Treaty.

Properly considered, the trust relationship should have mandated an interpretation of the Crow Treaty that conforms to the methodology employed in the *Mille Lacs* case. Under that framework, neither Wyoming's statehood nor the establishment of the Bighorn National Forest are sufficient to abrogate the important off-reservation hunting rights at issue in this case.

BACKGROUND

The Eastern Shoshone Tribe has existed in this continent since time immemorial. The Tribe has

a rich history of intergovernmental dealings with the United States, going back to the earliest days of the Republic. In fact, were it not for the aid of a young Shoshone woman named Sacajawea in 1805, it is very likely that the famous expedition of Captain Meriwether Lewis and his Second Lieutenant William Clark would never have found safe passage to the Pacific Ocean.

In subsequent years, the "familiar forces" of westward expansion, *cf. DeCoteau v. District County Court*, 420 U.S. 425, 431 (1975), would strain the relationship between the United States and the Tribe, as white settlers began to encroach upon the Tribe's aboriginal lands. Eventually, the two sovereigns entered into the Treaty of Fort Bridger in 1863, which guaranteed the Tribe a reservation encompassing about 44,672,000 acres. 18 Stat. 685, *see United States v. Shoshone Tribe*, 304 U.S. at 113. However, westward expansion accelerated after the Civil War, thus requiring even more land for the white settlers. Accordingly, the Tribe and the United States entered into a Second Treaty of Fort Bridger, 15 Stat. 673 (1868). By this treaty, the Tribe was guaranteed a much smaller reservation, encompassing around three million acres. *See Shoshone*, 304 U.S. at 113.

But the Second Treaty of Fort Bridger, despite ceding the vast majority of the Tribe's previous reservation, also included a number of important substantive rights, including the right of tribal members to hunt off-reservation. As Article 4 provides:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; *but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.*

15 Stat. 673, art. 4 (1868) (emphasis added).

In later years, the Northern Arapaho Tribe would come to co-occupy the Wind River Reservation, and the reservation boundaries would change somewhat due to various land purchases by the federal government. *See generally Wyoming v. EPA*, 875 F.3d 505 (10th Cir. 2017). But despite this co-occupation and the alterations to the boundaries of the reservation, the Second Treaty of Fort Bridger—and specifically its off-reservation hunting provisions—has never been abrogated.

ARGUMENT

I. THE FEDERAL TRUST RESPONSIBILITY REQUIRES AN EXPRESS SHOWING OF ABROGATION OF TREATY RIGHTS.

A. The federal government has a trust responsibility to Indian tribes.

It is a foundational tenet of federal Indian law that the United States owes a trust responsibility to Indian tribes. Pursuant to this trust responsibility, as a general matter, the federal government has an obligation to engage with tribes in good faith and to protect tribal sovereignty and tribal resources. *See generally* Reid Peyton Chambers, *Judicial Enforcement of the Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213 (1975). The precise contours of this trust relationship are ever-evolving, but the actual existence of the trust relationship is at this point "undisputed." *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

The trust responsibility is rooted in one of the Supreme Court's earliest Indian law decisions, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). The question presented in that case was whether the Cherokee Nation could be considered a "foreign nation" so as to allow the Supreme Court to exercise original jurisdiction under Article III. *Id.* at 15–16, 20. In holding that the tribe could not be considered a foreign nation, Chief Justice Marshall described tribes as "domestic dependent nations" and characterized the relationship between the United States and the tribes as that of "a ward to his guardian." *Id.* at 17. In other words, the federal government owed tribes a duty of protection.

This trust relationship would feature prominently in the development of federal Indian law over the next two centuries. In 1832, in the follow-on case to *Cherokee Nation*, the Court would interpret the federal government's trust responsibility as generally ousting state

governments from exercising jurisdiction over tribes, holding that the laws of the State of Georgia "can have no force" in Indian Country. *See Worcester v. Georgia*, 31 U.S. 515, 561 (1832). By the late 1800s, the trust responsibility had become the primary justification for the federal government's so-called "plenary" power over Indian affairs—despite the fact that the Constitution only explicitly grants Congress authority "to regulate *commerce* with . . . the Indian tribes," without specifically granting any broader general authority. *See United States v. Kagama*, 118 U.S. 375 (1886) ("[S]o largely due to the course of dealing of the federal government with [the tribes], and the treaties in which it has been promised, there arises a duty of protection, and with it the power."). In this way, the Court sanctioned an expansion of Congress's legislative role far beyond the traditional understanding of the doctrine of enumerated powers. *Cf. Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) ("The Constitution's express conferral of some powers makes clear that it does not grant others."). In more recent years, Congress has utilized this power to involve the federal government—in some shape or form—in nearly every high-level aspect of tribal affairs.

Indeed, over time, the trust responsibility has found support in countless federal statutes and Executive Branch proclamations. *E.g.*, Indian Child Welfare Act, 25 U.S.C. § 1901(3) ("[T]he United States has a direct interest, as trustee, in protecting Indian children . . . ."); Indian Trust Asset Reform Act, 25 U.S.C. § 5601(3) ("[T]hrough treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust

responsibility to protect and support Indian tribes and Indians."); Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5387(g) ("The Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions."); Native American Housing Assistance and Self-Determination Act, 25 U.S.C. § 4101(4) ("[T]he Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes . . . ."); *see also Consultation and Coordination with Indian Tribal Governments,* Exec. Order No. 13175, § 2(a) (Nov. 6, 2000) ("Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection."). By now, it is thus a well-entrenched part of federal Indian law.

B. The trust responsibility demands an interpretation methodology that requires a clear abrogation of treaty rights.

It is against this backdrop of the federal trust responsibility that courts should approach treaty-rights cases. Indeed, as Judge William Canby of the Ninth Circuit has explained, "[t]he trust relationship between the federal government and the Indian tribes ought to weigh heavily against implied abrogation of treaties." American Indian Law 133 (5th ed. 2009).

At the time of the earliest treaties, the guardian–ward dynamic had yet to fully materialize, and given the ongoing Revolutionary War, the Indians were actually negotiating treaties from a position of relative strength. The first treaty between an Indian tribe and the United States—the Treaty of Fort Pitt of 1778, with the Delaware Nation—is illustrative of the circumstances. 7 Stat. 13 (1778). Article III of the treaty expressly acknowledged the Revolution and granted the American troops "free passage" through the Delawares' territory—permission that was strategically critical for the military at the time. *See id.*, art. III. This provision—indicating the American military's need for the tribe's permission to cross its land—plainly reflected the understanding that "[b]oth parties to the treaty clearly assumed that continuing Indian ownership and possession of aboriginal lands included the Indians' right to govern, control, and exclude anyone on their lands, including Washington's army." *See* Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113, 119 (2002).

At the same time, even in this first treaty—in the midst of the Revolution—the notion of the United States' "duty of protection" was at work. While Article III of the Fort Pitt Treaty clearly contemplated the Delaware Nation's complete territorial sovereignty, language in Article VI simultaneously laid out the United States' duty to protect this sovereignty, providing as follows:

> Whereas the enemies of the United States have endeavored, by every

> artifice of their power, to possess the Indians in general with an opinion, that it is the design of the States aforesaid, to extirpate the Indians and take possession of their country: to obviate such false suggestion, the United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample manner, as it has been bounded by former treaties, as long as they the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into.

7 Stat. 13, art. VI. Hence, well before Chief Justice Marshall wrote that the relation of tribes to the United States "resembles that of a ward to his guardian," *Cherokee Nation*, 30 U.S. (5 Pet.) at 17, the terms of the Fort Pitt Treaty "illuminate[d] the purpose of the duty of protection, that later ripened into the so-called federal trust doctrine." Clinton, *supra*, 34 Ariz. St. L.J. at 124.

Indeed, the treaties themselves set the early groundwork for the trust relationship, as they contained some of the most overt language documenting the federal government's duty or protection. Take for example the Treaty of Hopewell with the Cherokee Nation, entered into on November 28, 1785. Article 3 of the treaty explicitly states that the Cherokees shall be "under the protection of the United States of America." 7 Stat. 18. This treaty proved critical to the *Cherokee Nation* decision, cited by Chief Justice Marshall as evidence of tribes'

status as "domestic dependent nations." *See Cherokee Nation*, 30 U.S. (5 Pet.) at 17 ("They acknowledge themselves in their treaties to be under the protection of the United States . . . ."). Around the same time as the *Cherokee Nation* case, the United States continued to enter into treaties, with those treaties often reaffirming its protective role. The Treaty of Dancing Rabbit Creek with the Choctaw Nation, for example, provided that "[t]he United States are obligated to protect the Choctaws." 7 Stat. 333 (Feb. 21, 1831).

Even apart from language explicitly identifying the guardian–ward dynamic between the federal government and tribes, the general provisions of most Indian treaties clearly indicated a trust relationship. For instance, in the Treaty of Fort Laramie with the Sioux Nation, the United States made a commitment to furnish the Indians with health care, education, and a variety of other essential services. *See* 15 Stat. 635, art. 13 (April 29, 1868) ("The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths as herein contemplated.").

Treaties thus form an integral part of the trust relationship between the United States and the tribes. Accordingly, in adjudicating treaty-rights cases, courts should ensure that treaties are interpreted with appropriate deference to the trust responsibility.

Deference to the trust responsibility in treaty interpretation is well-illustrated in the case of

United States v. Shoshone Tribe of Indians, 304 U.S. 111, a case involving the Second Treaty of Fort Bridger, discussed *supra*. The issue in the case was whether the treaty conferred upon the Shoshone Tribe the beneficial ownership of the timber and minerals on their reservation, so as to require just compensation upon the federal government's taking of those resources. *See id.* at 116. The Court noted that the treaty itself did not address the issue, but nonetheless acknowledged that the circumstances and practical construction favored a finding that the Tribe did in fact hold the beneficial interest in the natural resources. At the heart of this analysis was consideration of the guardian–ward relationship. The Court explained: "As transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals, or timber would be resolved in favor of the tribe." *Id.* at 117.

The case of *Seminole Nation v. United States*, 316 U.S. 286 (1942), likewise is instructive of the role that the trust responsibility has in treaty interpretation. The case involved a treaty between the United States and the Seminole Nation, entered into in 1856, which required the federal government to establish a trust fund for the Seminole Nation and to pay the interest from the fund to the tribal members per capita as an annuity. *See id.* at 294. However, instead of making the payments directly to the tribal members, the federal government made the payments to the Seminole General Council, even though they were known to be corrupt. The government argued that the payments were "made at the request of the tribal council, the governing

body of a semiautonomous political entity" and that the payments therefore "discharged the treaty obligation because the agreement was one between the United States and the Seminole Nation and not one between the United States and individual members of the tribe." *Id.* at 295. The Court rejected this argument, explaining as follows:

> In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Id. at 296–97 (footnote citation omitted).

Granted, *Shoshone* and *Seminole* involved issues regarding the *scope* of treaty rights and whether treaty obligations were properly *discharged*, respectively, not the issue of whether treaty rights have been abrogated entirely by a subsequent federal law. But even when the issue is abrogation, federal courts have similarly remained cognizant of the trust responsibility. *See, e.g., United States v. State of Washington*, 157 F.3d 630, 649 (9th Cir. 1998). Indeed, the canon of liberal interpretation

applicable to Indian treaties is "rooted in the unique trust relationship between the United States and the Indians," and cases involving claims that treaty rights have been abrogated fall squarely within that interpretive framework. *Id.* (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 227, 247 (1985)).

II. THE RIGHT TO HUNT ON "UNOCCUPIED LANDS" IS NOT EXTINGUISHED BY STATEHOOD OR BY THE CREATION OF A NATIONAL FOREST.

In the case now before the Court, Respondent claims that the Crow Tribe's treaty right to hunt off-reservation has been extinguished by the admission of Wyoming into the Union in 1890, or alternatively, by the establishment of the Bighorn National Forest in 1897. The proper interpretation of the Crow Treaty—with appropriate deference for the federal trust responsibility—forecloses both of Respondent's arguments.

The Crow Tribe's off-reservation hunting rights are enshrined in language that is essentially identical to Article 4 of the Second Treaty of Fort Bridger, described *supra*. It provides:

> The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be

> found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

Crow Treaty, 15 Stat. 649, art. 4.

The theory that statehood alone has the force to extinguish a tribe's treaty right to hunt off-reservation was fully discredited when this Court issued the *Mille Lacs* decision, holding that "statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." 526 U.S. at 205. To the extent the Court's prior decision in *Ward v. Race Horse*, 163 U.S. 504 (1896), suggested otherwise, *Race Horse* has thus been overruled. Accordingly, because the Wyoming District Court's conclusion that Wyoming's statehood abrogated the Crow Tribe's hunting rights relied entirely on *Crow Tribe v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1994), *aff'd*, 73 F.3d 982 (10th Cir. 1995), which in turn relied on *Race Horse*, the analysis was flawed, and should be reversed.

The lower court's alternative theory regarding the Bighorn National Forest, taken from the "alternative" determination in the Tenth Circuit's *Repsis* decision, was likewise misguided. The 1897 proclamation establishing the Bighorn National Forest could not have possibly rendered the land "occupied" for at least two reasons. First, the proclamation expressly states that the land was "reserved from entry or settlement" and that persons were "not to make settlement upon" the land—language that could not reasonably be construed as

stripping the land of its "unoccupied" status. Presidential Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897). Second, even if President Cleveland intended to render the land "occupied"—which clearly he did not—he had no authority to do so. The proclamation was issued under the authority of the Forest Reserve Act, 26 Stat. 1095 (1891), which explicitly provided that "nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands."

These deep flaws in the lower court's reasoning become even more evident when the treaty rights are interpreted within the greater trust relationship that exists between the Crow Tribe and the United States.

The Crow Treaty outlined a clear guardian–ward relationship between the United States and the Crow Tribe. It ensures that tribal members would be protected against violence at the hands of the non-Indian population, providing that if any "bad men" commit a wrong upon members of the Tribe, the United States would "cause the offender to be arrested and punished" pursuant to federal law. 15 Stat. 649, art. 1. Further, in addition to ensuring safety against potentially violent outsiders, the Crow Treaty also required the United States to assist with a variety of general governmental services. For example, the United States had the obligation to assist with the education of tribal children, art. 7, and with the agricultural development of tribal land, art. 9. And, at the heart of this case, the Crow Treaty also imposed upon the federal government

the obligation to allow members of the Crow Tribe "to hunt on the unoccupied lands of the United States." *See* art. 4. As this Court has made clear, in fulfilling treaty obligations—such as the obligations in Article 4 of the Crow Treaty—"the Government is something more than a mere contracting party. . . [I]t has charged itself with moral obligations of the highest responsibility and trust." *Seminole*, 316 U.S. at 296–97.

It is against this standard that the Court should approach the issue of whether the Crow Tribe's treaty-guaranteed off-reservation hunting rights have been extinguished. Properly taking into account the guardian–ward relationship, it is clear that removing the off-reservation hunting right either through the Wyoming Statehood Act or the Presidential Proclamation would have constituted a grave violation of the United States' trust obligations. Straightforward application of long-established treaty-interpretation principles does not call for such an outcome, and this Court should not allow it.

CONCLUSION

The judgment of the District Court of Wyoming should be reversed.

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In the

Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ of Certiorari to the District Court of Wyoming, Sheridan County

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INTEREST OF AMICI CURIAE[1]

Amici are professors and scholars of Indian law listed in the APPENDIX. Amici submit this brief to assist the Court with the proper application of its precedent relevant to the Supremacy Clause of the United States Constitution, treaties between the United States and Indian tribes, and the Court's standards for interpreting those treaties.

SUMMARY OF THE ARGUMENT

This Court consistently applies well-established principles of interpretation to treaties between the United States and Indian tribes. Those interpretive standards protect important aspects of both the United States' constitutional structure and tribal identity. The decision below by the Wyoming District Court did not adhere to those time-honored rules of interpretation and is inconsistent with this Court's precedent. Therefore, the Court must reverse that decision.

Prior to 1868, Crow Tribal territory, at least as recognized by the United States in the 1851 Fort Laramie Treaty, encompassed nearly 40 million acres, most of which was located in what became Montana and Wyoming. First Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749 (reprinted in 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 594-595 (1904)). In

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* file this brief as individuals and not on behalf of the institutions with which they are affiliated. Both Petitioner and Respondent consent to the filing of amicus briefs.

1868, the Crow Tribe ("Tribe") ceded more than three-quarters of that land, over 30 million acres, to the United States via a subsequent treaty. *Crow Tribe of Indians v. United States*, 284 F.2d 361, 362 (Ct. Cl. 1960). Importantly, however, in exchange for that cession and in order to protect access to game they needed to survive, the Tribe reserved the essential right to utilize traditional hunting, fishing, and gathering sites located outside their reservation. Specifically, the 1868 Treaty reserved to the Tribe the "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Treaty with the Crows, art. 4, May 7, 1868, 15 Stat. 649, 650.

Treaties are the supreme law of the land, U.S. Const. art. VI, § 1, cl. 2, and they remain valid unless and until Congress clearly expresses its intent to abrogate them. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) ("*Mille Lacs*"). ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." (citations omitted)); *see also United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346, 353-54 (1941) (Congress must be "plain and unambiguous" or "clear and plain" when abrogating tribal property rights.). Additional long-standing principles of treaty interpretation developed and applied by the Court require that treaties, along with any ambiguous language therein, be construed as the Indians would have understood them and be liberally interpreted in favor of the Indians. *See, e.g., Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Bryan v. Itasca Cty.*, 426 U.S. 373, 392 (1976); *Menominee Tribe*

of Indians v. United States, 391 U.S. 404, 412-13 (1968) (declining "to construe the [Menominee] Termination Act as a backhanded way" to destroy the hunting and fishing rights, described by the Court as "property rights," reserved by the Tribe in an earlier treaty).

The Court's long tradition of applying these interpretive standards ensures that government power is based on the consent of the governed and protects important structural aspects of federal Indian law and jurisprudence. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 551-57 (1832) (interpreting the Treaty of Hopewell in view of congressional policy to "treat [tribes] as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate"). Following that tradition, which culminated most recently in the Court's 1999 *Mille Lacs* decision, provides clear and straightforward answers to the questions presented in this case.

Like other Indian nations, the Crow Tribe formally associated with the United States through treaties that cemented a consensual, intergovernmental relationship. The Treaty of 1868 memorialized certain terms of that agreement, including the Tribe's right to continue to "hunt on the unoccupied lands of the United States." Treaty with the Crows, art. 4, May 7, 1868, 15 Stat. 649, 650. No subsequent treaties or statutes, including the Act admitting Wyoming to the Union, demonstrate any clear or unambiguous statement that Congress intended to terminate that right. Therefore, when properly applied, this Court's standards for Indian treaty interpretation confirm the Crow Tribe's

ongoing right to hunt in the Bighorn National Forest in Wyoming.

The decisions of the Wyoming courts below ignored these judicially recognized legal principles and, instead, relied exclusively on the flawed reasoning of a 1995 United States Court of Appeals for the Tenth Circuit case, *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, and a United States Supreme Court case from 1896, *Ward v. Race Horse*, 163 U.S. 504. This approach incorrectly rendered the Crow Treaty subject to different, uncertain, and less stringent interpretive rules than those applied by this Court to all other Indian treaties. Therefore, the Court should reverse the judgment of the Wyoming District Court.

ARGUMENT

I. As the Supreme Law of the Land, Indian Treaties Establish the Central Tenets of Federal Indian Law.

Treaties made by and between the United States and Indian tribes form the foundation of the unique federal-tribal relationship and have defined that relationship since this Court's earliest decisions. These treaties are the supreme law of the land, U.S. Const. art. VI, § 2, cl. 2, and remain enforceable unless Congress has clearly abrogated them by subsequent treaty or statute. *See, e.g.*, *Mille Lacs*, 526 U.S. at 202; *United States v. Dion*, 476 U.S. 734, 739-40 (1986).

Through their treaty relationships with the United States, Indian tribes have been recognized as distinct nations since the beginning of the Republic. In one of its earliest Indian law decisions, for example, this Court recognized that "[t]he numerous treaties

made with [Indian tribes] by the United States recognize them as a people . . . responsible in their political character for any violation of their engagements.". *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831). The Court continues to recognize Indian tribes based on that conception of their separate political character. *See, e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) ("For nearly two centuries now, we have recognized Indian tribes as 'distinct, independent political communities.'" (quoting *Worcester*, 31 U.S. at 559)).

Furthermore, although Indian nations are subject to federal authority, their exclusive treaty relationship with the United States generally insulates them from state authority in the absence of express federal legislation to the contrary. "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union." *Worcester*, 31 U.S. at 557. Because the acts of the State of Georgia in *Worcester* "interfere[d] forcibly with the relations established between the United States and the Cherokee nation" and were "in direct hostility with [those] treaties," the Court determined the state laws could "have no force" within Cherokee territory. *Id.* at 561. It remains well established that treaties are a central component of the federal relationship with Indian tribes, and even outside of their territory, Indian tribes and their individual members exercising federally guaranteed treaty rights are generally free from regulation by the

states. *See, e.g.*, *United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942).

II. The Court Developed and Relies on Long-Standing Principles of Interpretation for Analyzing Indian Treaties.

In light of the importance of treaties to the federal-tribal relationship, the Court fashioned specific rules of construction for interpreting treaties that give proper respect to the solemnity and purpose of those contracts. These rules, sometimes referred to as "canons of construction," *see, e.g.*, *Cty. of Oneida*, 470 U.S. at 247; *Antoine v. Washington*, 420 U.S. 194, 199 (1975), honor both the elevated status of treaties under the Constitution and their meaning and intent. *See, e.g.*, *Worcester*, 31 U.S. at 551-57 (interpreting the Treaty of Hopewell in view of congressional policy to "treat [tribes] as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate"). These fundamental maxims of treaty interpretation are not simply an effort to address a perceived inequality in bargaining power between tribes and the United States. Instead, the rules are "rooted in the unique trust relationship between the United States and the Indians[,]" *Cty. of Oneida*, 470 U.S. at 247, and "have quasi-constitutional status . . . provid[ing] an interpretive methodology for protecting fundamental constitutive, structural values against all but explicit congressional derogation." *Cohen's Handbook of Federal Indian Law* § 2.02[2], at 118-19 (Nell Jessup Newton, ed., 2012).

The Court employs three basic interpretive principles when analyzing treaties between the United States and Indian tribes. First, the Court

"interpret[s] Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Mille Lacs*, 526 U.S. at 196 (citations omitted) (emphasizing the importance of the context of a treaty). This rule requires looking at treaty language "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *see also United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938) (Treaties "are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them." (citations omitted)).

Second, the Court liberally interprets the language of Indian treaties in favor of the Indians. As early as 1832, in *Worcester*, the Court instructed that, if the context of a treaty suggests its language can be extended beyond its "plain import," then the language must be interpreted with that broader understanding. 31 U.S. at 582. Ambiguities in the treaty language are resolved in favor of the Indians. *See, e.g., McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174 (1973). The responsibility to interpret treaties in this manner seeks to ensure that treaty terms "are carried out, so far as possible . . . in a spirit which generously recognizes the full obligation of this nation to protect the interests of [Indian] people." *Tulee*, 315 U.S. at 684-85; *see also Antoine*, 420 U.S. at 199 ("The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." (citing *Worcester*, 31

U.S. 515)); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) (*"Fishing Vessel"*). Justice Scalia, writing for the majority in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, recognized that this principle is "deeply rooted in th[e] Court's Indian jurisprudence" and "dictated" the Court's interpretive choices in that case. 502 U.S. 251, 269 (1992).

Finally, the rights reserved by treaties remain intact unless Congress has expressed clear and unambiguous contrary intent. *Mille Lacs*, 526 U.S. at 202 ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." (citations omitted)); *Cty. of Oneida*, 470 U.S. at 257; *Fishing Vessel*, 443 U.S. at 690. This rule avoids the inadvertent taking of tribal property rights—and the corresponding obligation to provide due compensation—by ensuring that federal actions should never be interpreted to abrogate reserved treaty rights by implication. *See, e.g., Menominee Tribe of Indians*, 391 U.S. at 412-13, 417.

The state court decisions in this case ignored this Court's interpretive rules and, instead, determined that the mere admission of Wyoming as a state impliedly abrogated hunting rights promised to the Crow Tribe by the federal government in the 1868 Treaty. *See* Pet.App.32, 34.

III. The Court's Long-Standing Principles of Indian Treaty Interpretation Demonstrate Why the Decision Below Should Be Reversed.

A. These Principles Apply to All Indian Treaties.

The Court developed specific standards for interpreting Indian treaties in order to protect the quasi-constitutional status of treaties and preserve the benefit of the bargains that those documents memorialize. Failing to apply those rules when engaging in treaty interpretation endangers the very foundations of this Court's Indian law and constitutional jurisprudence. The Court developed those interpretive rules because of the importance of Indian treaties to the creation of our nation and in recognition that the United States' promises should be honored, whether pledged two centuries or two minutes ago. *Cf. Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word."). Thus, failing to adhere to these principles is an affront to the dignity of those solemn guarantees.

Treaty promises continue to define the contours of this Court's more modern Indian law jurisprudence, *see, e.g.*, *Mille Lacs*, 526 U.S. at 196-203, and form the basis of the ongoing government-to-government relationship among tribes, states, and the United States. Allowing alternative interpretive approaches by state courts would render both the United States and signatory tribes subject to inconsistent and potentially arbitrary judicial review of their

agreements. While the different language, meaning, and intent of each treaty demand specific attention, the rules by which courts must attend to that analysis are well-established. Allowing deviation from those standards, given the long history of this Court's stalwart commitment to them, would not only demean the hundreds of treaties between the United States and Indian tribes, it would plunge into uncertainty the meaning and scope of the relationships established by those treaties.

B. The Court Has Applied These Interpretive Principles to Permit Indians to Exercise Reserved Treaty Rights to Hunt and Fish Off-Reservation Notwithstanding State Regulation.

The exercise by an individual Indian of a treaty-reserved right to hunt or fish off-reservation can lead to conflict with local and state laws. With the exception of *Race Horse*, the Court has consistently resolved these conflicts by applying the well-established standards for interpreting Indian treaties to insulate the exercise of tribal treaty rights from state regulation except in narrow and specific circumstances.

The Court's approach to enforcing tribes' off-reservation treaty rights began with *Winans* in 1905. 198 U.S. 371. In that case, non-Indians had effectively blocked tribal members from accessing their traditional fishing grounds by constructing a fish wheel on the non-Indians' private property. *Id.* at 377. The Court interpreted treaty language to require tribes' access to their traditional sites even though the non-Indians had complied with state law. *Id.* at 381-

82, 384. The Court recognized that the right to use traditional fishing locations was "part of larger rights possessed by the Indians," and that the "form of the [treaty] and its language was adapted" to preserve the exercise of those rights. *Id.* at 381. The Court expressly rejected the argument that the Tribe's reserved rights were abrogated by admission of the State of Washington to the Union. *Id.* at 382-84.

Similarly, in *Tulee*, the Court considered Washington's conviction of a member of the Yakima Tribe for failure to obtain a state license to fish. 315 U.S. at 682. "Viewing the treaty in . . . light" of the rule requiring liberal construction and an understanding of the language as the Indians would have understood it, the Court determined that the "state is without power to charge the Yakimas a fee for fishing" because the State's licensing requirement could not "be reconciled with a fair construction of the treaty." *Id.* at 685.[2]

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[2] In a series of cases following *Winans* and *Tulee*, the Court defined the balance between off-reservation treaty rights and state authority by allowing that states may regulate off-reservation exercise of treaty rights only as necessary for the conservation of a species, and only if the state's regulation does not discriminate against Indians. *See Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392 (1968) (*Puyallup I*); *Dep't of Game of Wash. v. Puyallup Tribe*, 414 U.S 44 (1973); *Antoine*, 420 U.S. 194; *Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165 (1977); *Fishing Vessel*, 443 U.S. at 675-76. In each of these cases, the Court analyzed the relevant treaty or other agreement in accordance with established interpretive principles. *E.g.*, *Puyallup I*, 391 U.S. at 397-98 ("It is in th[e] spirit [of liberal treaty construction] that we approach these cases."); *Antoine*, 420 U.S. at 199-200; *Fishing Vessel*, 443 U.S. at 675-76. The decision

The Court most recently and extensively pronounced its interpretive standards for Indian treaties in 1999 in *Mille Lacs*. 526 U.S. at 196-203. There, the majority interpreted treaty language to recognize that the usufructuary rights reserved by the treaty were more than mere "privileges" that would "justify [a] difference[ ] in [allowing] state regulatory authority." *Id.* at 205-06. As described in greater detail *infra*, *Mille Lacs* does not support the decision below.

These principles of construction are fundamental to this Court's Indian law jurisprudence and necessary for ensuring that treaties and the rights preserved by them are given due consideration and protection as usufructuary rights reserved under federal law.

C. The Court's Interpretive Rules Require Preservation of Tribal Treaty Rights to Ensure That Constitutional Power Is Based on the Consent of the Governed.

Congress has broad authority to legislate in the domain of Indian affairs; however, the exercise of federal power over Indian nations is problematic because Indian nations were not parties to the Constitution. Indian nations like the Crow Tribe negotiated agreements with the United States. Those treaties have a quasi-constitutional status, both because they are the supreme law of the land and because they provide a source of federal power that is potentially based on mutual consent.

Treaties provided a mechanism for Indian tribes to retain the lands, waters, and hunting, fishing, and

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below did not take up the "conservation necessity issue" and it is not before the Court in this case. Pet.App.25 n.7; Pet.App.14 n.3;

gathering rights on which their ways of life would continue to depend. At the time the treaties were entered, these rights were "not much less necessary to the existence of the Indians than the atmosphere they breathed," *Winans*, 198 U.S. at 381, and they have remained so to the present day. As Judge Boldt noted in his landmark 1974 decision regarding tribal fishing rights in the State of Washington, treaty rights protect "the means of economic livelihood and the foundation of native culture," and "[r]eservation of the right to gather food in this fashion protected the Indians' right to maintain essential elements of their way of life, as a complement to the life defined by the permanent homes, allotted farm lands, compulsory education, technical assistance and pecuniary rewards offered in the treaties." *United States v. Washington*, 384 F. Supp. 312, 406-07 (W.D. Wash. 1974), *aff'd* 520 U.S. 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). Off-reservation usufructuary rights remain essential to the very identity of the tribes and tribal people who exercise them today. *See, e.g.*, Columbia River Intertribal Fish Comm'n, *We Are All Salmon People*, http://www.critfc.org/salmon-culture/we-are-all-salmon-people/ (last visited Oct. 25, 2017); Allison M. Dussias, *Spirit Food and Sovereignty: Pathways for Protecting Indigenous Peoples' Subsistence Rights*, 58 Clev. St. L. Rev. 273, 276 (2010) (Subsistence resources "are not just food for the body, but also 'spirit food.'").

Thus, the Court's approach to treaty interpretation ensures the fulfillment of the historic bargains through which the United States acquired much of its territory. The treaties marked the terms of that exchange. The United States obtained land and

an end to hostilities and pledged in return to respect remaining tribal homelands, tribal political existence, and the ability for tribes to sustain themselves. The terms of those treaties "seemed to promise more, and give the word of the nation for more" to Indian tribes than that guaranteed to other citizens. *Winans*, 198 U.S. at 380. In order to ensure those promises are kept, the Court's interpretive standards recognize that a "treaty was not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted." *Id.* at 381.

IV. The Decision of the Wyoming District Court Is Inconsistent With This Court's Interpretive Tradition.

The Wyoming District Court failed to apply the Court's long-standing interpretive rules of construction. Instead, it simply endorsed the trial court's "adopt[ion of] the analysis and conclusions" of *Repsis*, which largely tracked the Supreme Court's 1896 decision in *Race Horse*. Pet.App.34. In addition, the District Court, like the trial court before it, misinterpreted *Mille Lacs* to support its decision. *Id.* The decision below is contrary to this Court's jurisprudence.

A. *Race Horse* and *Repsis* Depart From This Court's Indian Treaty Precedent.

Both *Race Horse* and *Repsis* interpreted Indian treaties to resolve ambiguities against the tribes involved. First, the *Race Horse* Court took pains to interpret the relationship between the phrases "unoccupied lands of the United States" and "so long as peace subsists among the whites and Indians on the borders of the hunting districts" in the Eastern

Shoshone and Bannock Treaty. 163 U.S. at 507-14. While initially conceding that the former phrase alone would protect hunting rights across all federal lands, the Court then determined that the meaning of that phrase must be controlled by the subsequent phrase, specifically the words "hunting districts." *Id.* at 507-08. Although the Court did not define the term "hunting districts," it interpreted that phrase to mean that the treaty rights at issue were contingent upon the continuing existence of the "hunting districts" and, therefore, were of a "temporary and precarious nature." *Id.* at 509-10 (The treaty no longer "authorized the continued enjoyment of the right of killing game . . . when the territory ceased to be a part of the hunting districts, and came within the authority and jurisdiction of a state.").

While the parties to the treaty may have understood that the treaty language conditioned the tribal hunting rights on certain circumstances—"unoccupied land," the presence of game, peace—the *Race Horse* Court combined those terms to concoct its own understanding of the treaty, which denigrated those rights without regard for the parties' intent or the tribal interests at stake. The Court then relied on that construction to find that Wyoming's subsequent statehood, an event occurring much later, unmentioned in the treaty, and not considered during its negotiation, ended the tribal rights. By interpreting the treaty to secure only "temporary and precarious" rights, the *Race Horse* Court simply "declined to follow" the applicable interpretive rules in favor of its own approach. *Race Horse*, 163 U.S. at 516; *Repsis*, 73 F.3d at 992.

Ignoring the absence of any express language in Wyoming's statehood act regarding treaty rights, the *Repsis* court applied to the Crow Treaty *Race Horse*'s "abrogation-by-implication" approach. *Id.* ("The Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union." (citing *Race Horse*, 163 U.S. at 514)). *Repsis* further followed the lead of *Race Horse* to fashion its own interpretive construction of the Crow Treaty. After deferring entirely to *Race Horse*'s "temporary and precarious" construction, the *Repsis* court then struck out on its own to find an "alternative basis" for its holding. *Id.* at 993. Interpreting the treaty term "unoccupied," the court determined that creation of the "Big Horn National Forest" limited certain activities on those lands, thereby rendering them occupied and ending the Crow's treaty rights. *Id.* ("These lands were no longer available for settlement. No longer could anyone timber, mine, log, graze cattle, or homestead on these lands without federal permission." (citing Act of June 4, 1897, ch. 2, 30 Stat. 11, 35-36)).[3] The *Repsis* court neither considered what the parties to the treaty intended by "unoccupied" nor engaged in any treaty interpretation on that question.[4]

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[3] While now named the Bighorn National Forest, the area was originally called the Big Horn Forest Reserve. *See, e.g.*, Presidential Proclamation No. 393, 29 Stat. 909 (Feb. 22, 1897).

[4] *Repsis* also overlooked interpretations of that term and similar treaty language by other courts, most of which reached exactly the opposite conclusion about its meaning. *See Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 42 F.3d 1278 (9th Cir. 1994); *Stc'e v. Tinno*, 497 P.2d 1386 (Idaho 1972); *State v. Stasso*,

B. *Mille Lacs*, Not *Race Horse* or *Repsis*, Guides Resolution of the Questions Presented Here.

Applying the interpretive guidance set forth in *Mille Lacs* to the treaty language at issue in this case demonstrates the inconsistency of *Race Horse*, *Repsis*, and the decisions below with the great weight of this Court's jurisprudence interpreting Indian treaties. Applying that guidance to the Crow Treaty confirms the ongoing existence of the hunting rights reserved therein.

First, *Mille Lacs* reiterated the need to understand treaty language as the tribal party to that treaty would have understood it. 526 U.S. at 196. No court yet has analyzed what the members of the Crow Tribe would have understood the treaty to mean with regard to their "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Treaty with the Crows, art. 4, May 7, 1868, 15 Stat. 649, 650.

Second, *Mille Lacs* flatly rejected the notion that the admission of a state to the United States would, standing alone, mark an end to treaty-reserved rights within that state. 526 U.S. at 205 ("[S]tatehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries."). Congress apparently understood the same, as legislation enacted subsequent to Wyoming's

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563 P.2d 562, 565 (Mont. 1977); *State v. Arthur*, 261 P.2d 135, 143 (Idaho 1953).

statehood expressly recognized the continuing existence of rights reserved in the Crow Treaty of 1868. *See, e.g.*, An Act: Making appropriations for the current and contingent expenses of the Indian Department, ch. 543,§ 31, 26 Stat. 989, 1042, (1891) (ratifying an agreement with the Crow Indians regarding sale of lands and construction of school houses and other facilities with the proviso that "all existing provisions of the treaty of May seventh Anno Domini eighteen hundred and sixty-eight . . . shall continue in force"); An Act to ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect, Pub. L. No. 58-183, Art. VII, 33 Stat. 352, 355 (1904) ("The existing provisions of all former treaties with the Crow tribe of Indians not inconsistent with the provisions of this agreement, are hereby continued in force and effect, and all provisions thereof inconsistent herewith [pertaining to sale of a portion of the reservation] are hereby repealed."). Nonetheless, according to *Race Horse* and *Repsis*, Wyoming's admission to the Union created an "irreconcilable conflict" with the treaty rights reserved by the Crow. *Race Horse*, 163 U.S. at 514; *Repsis*, 73 F.3d at 990.

Third, according to *Mille Lacs*, "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." 526 U.S. at 202 (citations omitted). Although construing the Eastern Shoshone and Bannock Treaty, not the Crow Treaty, the *Race Horse* majority found no express language in that treaty or in Wyoming's statehood act that signaled the end of those treaty rights. *See* 163 U.S. at 511, 514 (Although "repeals by implication are not favored . . .

repeal [of the treaty-reserved rights] result[ed] from the conflict between the treaty and the act admitting [Wyoming] into the Union," despite the silence of that act as to treaty rights.). *Repsis* then adopted this misguided approach when interpreting the Crow Treaty. *Repsis*, 73 F.3d at 990.

Finally, *Mille Lacs* reiterated the Court's prior instructions that "Indian treaties are to be interpreted liberally in favor of the Indians . . . and that any ambiguities are to be resolved in their favor." 526 U.S. at 200 (citations omitted). The Court followed that rule when interpreting language in an 1855 treaty pursuant to which the Mille Lacs Band of Chippewa had agreed to "fully and entirely relinquish and convey to the United States, any and all right, title and interest . . . in, and to any other lands." *Id.* at 195 (quoting Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165). Noting that the language said nothing about the Chippewa's 1837 treaty; the hunting, fishing, and gathering rights in territories across Minnesota they reserved in that treaty; or the abrogation of those rights, the Court concluded that even if such silence amounted to a "plausible ambiguity," the Court's interpretive standards required ruling in favor of the Chippewa. *Id.* at 200.

Rather than follow *Mille Lacs*' deliberate and thorough approach to treaty interpretation, the Wyoming circuit court instead relied solely and erroneously on *Repsis*, concluding that the Crow "hunting rights were temporary and ended upon the occupation of the [Bighorn National Forest]." Pet.App.41. Then, rather than correct that misguided approach and adhere to *Mille Lacs*, the Wyoming

District Court instead determined that *Mille Lacs* only "reaffirmed the principle that the court must look at the language in the treaty to determine whether it was intended to be perpetual or if it was intended to terminate at the occurrence of a 'clearly contemplated' event." Pet.App.34. Neither of these approaches is viable in light of *Mille Lacs* and the Court's long-standing interpretive principles repeated in that decision.

C. *Mille Lacs* Repudiated *Race Horse* and *Repsis*.

By myopically relying on *Race Horse* and *Repsis*, the decisions below ignored this Court's evisceration of the legal theories undergirding those decisions. The majority opinion in *Mille Lacs* repeatedly criticized the reasoning of *Race Horse*, saying that the decision "has been qualified by later decisions of th[e] Court," 526 U.S. at 203, that it "rested on a false premise," *id.* at 204, and that it "[wa]s simply too broad to be useful as a guide to whether treaty rights were intended to survive statehood." *Id.* at 206. Even the core of *Race Horse*'s central inquiry, *i.e.*, "whether Congress . . . intended the rights secured by the [relevant treaty] to survive statehood," 526 U.S. at 207, was mistaken:

> Race Horse rested on a false premise. As this Court's subsequent cases have made clear, an Indian tribe's treaty rights to hunt, fish, and gather are not irreconcilable with a State's sovereignty over natural resources in the State. . . . [*Race Horse*] was informed by that Court's conclusion that the Indian treaty rights were inconsistent with state sovereignty over natural resources . . . .But . . . Indian treaty-based

> usufructuary rights are not inconsistent with state sovereignty over natural resources.

Id. at 204, 207-08.

In light of the majority's obvious disagreement with *Race Horse*, Chief Justice Rehnquist, in dissent, concluded that the *Mille Lacs* majority had "effectively overrule[d]" *Race Horse*. *Id.* at 219. Thus, contrary to the overly narrow and inapt reading of *Race Horse* by the Wyoming District Court, *see* Pet.App.24, *Mille Lacs* implicitly overruled *Race Horse* and, by extension, *Repsis*. *See also State v. Tinno*, 497 P.2d 1386, 1392 n.6 (Idaho 1972) (In a decision pre-dating *Mille Lacs* by a quarter century, the Idaho Supreme Court read this Court's precedent to see that "*Race Horse* and the theory it posited ha[d] been entirely discredited.").

By relying on *Repsis* and *Race Horse*, the decision below failed to follow this Court's directions for interpreting the Crow Treaty. This Court must correct those errors by applying its well-established rules for interpreting Indian treaties.

CONCLUSION

This Court has faithfully and repeatedly protected the tribal rights reserved in treaties with the United States from unjustified abrogation and improper subjugation to state authority. Such protection is mandated by the supremacy of federal treaties under the Constitution and the need to ensure justice for the tribal parties to those agreements. *See, e.g., Winans*, 198 U.S. at 380-81 (interpreting the treaty at issue so as to "counterpoise the inequality" of treaty negotiations and observing that the "negotiations and a convention . . . seemed to promise more, and give the

word of the nation for more" than the mere "rights . . . that any inhabitant of the territory or state would have").

The decisions of the Wyoming courts in this matter diverged from that tradition in favor of following the faded hoof prints of *Race Horse* and *Repsis*. Those decisions below ignored the fact that *Mille Lacs* fatally undercut both *Race Horse* and *Repsis*. This case presents an opportunity for this Court to reaffirm the well-founded interpretive principles it developed for Indian treaties. Doing so is necessary to honor the "deeply rooted" role of those principles in the Court's Indian law jurisprudence and avoid the uncertainty and confusion that would result from endorsing alternative approaches to treaty interpretation by state and lower federal courts. *Cty. of Yakima*, 502 U.S. at 269.

The Court should reverse the judgment of the Wyoming District Court.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Appendix A

List of Amici Curiae Indian Law Professors... App-1

APPENDIX A

This Appendix provides titles and institutional affiliations for identification purposes only.

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No. 17-532

In the
Supreme Court of the United States

CLAYVIN HERRERA,

PETITIONER,

v.

WYOMING,

RESPONDENT.

On Writ of Certiorari to the District Court of Wyoming, Sheridan County

BRIEF FOR TIMOTHY P. MCCLEARY, JANINE PEASE, ELIZABETH SWANK, ESTHER WYNNE, SARA BENJAMIN-NEELON, CAITLIN BORGMANN, MEGAN SINGER, AND SAMUEL ENEMY-HUNTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are experts in their respective fields of anthropology, education, law, and public health. Many of them have devoted their careers to studying, representing, educating, and treating the Crow Tribe of Indians. Because the decision below imperils public health by trampling the Tribe's treaty-protected right to hunt, amici file this brief in support of petitioner. The signatories to the brief, with affiliations provided for identification purposes only, are as follows:

Timothy P. McCleary, Ph.D., is an anthropology professor at Little Big Horn College in Crow Agency, Montana. He speaks and reads the Crow language and has spent much of his career researching, teaching, and writing about the origins, history, and contemporary beliefs and practices of the Crow people.

Janine Pease, D.Ed., is the founding president of Little Big Horn College, a recipient of the MacArthur "genius grant," and a former trustee of the Smithsonian's National Museum of the American Indian. She now teaches Crow Studies and other disciplines at Little Big Horn College. A member of the Crow Tribe, she is the great-granddaughter of White Man Runs Him, one of the Crow scouts who served with Lieutenant Colonel George Armstrong Custer at the Battle of the Little Bighorn.

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[1] Petitioner's and respondent's letters giving blanket consent to amicus briefs are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to this brief's preparation or submission.

Elizabeth Swank serves as the Public Health Emergency Preparedness Coordinator for the Public Health Department of Big Horn County, Montana, much of which is covered by the Crow reservation. As the spouse of a Crow hunter, she has firsthand knowledge of the dietary importance of keeping a freezer stocked with fresh elk meat throughout the long Montana winters.

Esther Wynne, R.N., B.S.N., P.H.N., serves as the Public Health Nurse for the Public Health Department of Big Horn County, Montana. After a quarter-century in that role, she has in-depth experience and understanding regarding the cultural and nutritional aspects of subsistence hunting, the importance of elk meat in the Crow way of life, the persistence of hunger on the Crow reservation, and the prevalence of obesity and type 2 diabetes among native peoples who have abandoned the traditional game-based diet.

Sara Benjamin-Neelon, Ph.D., M.P.H., J.D., R.D., is an Associate Professor in the Department of Health, Behavior and Society and Director of the Lerner Center for Public Health Promotion at Johns Hopkins Bloomberg School of Public Health. She is also a faculty fellow in the Centre for Diet and Activity Research at the University of Cambridge in England. As a public health researcher, her work focuses on policy and environmental approaches to chronic disease prevention in children and their families.

Caitlin Borgmann, J.D., is the Executive Director of the ACLU of Montana. The ACLU of Montana has adopted Indigenous Justice as the

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Megan Singer is the ACLU of Montana's Indigenous Justice Program Manager. Ms. Singer is an expert on the history of interactions between the United States Government and Indigenous peoples. Ms. Singer spends the vast majority of her time working with Indigenous communities to deepen understanding of issues related to public health, education equity, and tribal sovereignty.

Samuel Enemy-Hunter is an Indigenous Justice Organizer for the ACLU of Montana. An enrolled member of the Apsaalooke (Crow) Tribe, Mr. Enemy-Hunter works on and off the Reservation to advocate for the civil rights and civil liberties of Indigenous peoples. Mr. Enemy-Hunter is an Apsaalooke cultural and traditional leader and educator and an avid hunter. He advocates for treaty rights to hunt and fish as a form of vindicating tribal sovereignty.

SUMMARY OF ARGUMENT

The Apsaalooke people, known in English as the Crow Tribe of Indians, have "always valued hunting and gathering in Crow Country as an activity of the highest cultural importance and the means for survival." Crow Tribal Legislature, Joint Action Resolution No. 13-09 (May 7, 2013), *available at* https://goo.gl/sbo1Gj. In various treaties with the United States, the Tribe has protected its right to hunt in exchange for ceding traditional tribal lands to the United States. In this case, the Court is asked to interpret one of those treaties and to decide whether the Tribe's members may "maintain a traditional practice of subsistence hunting that is foundational to their identity and well-being." Pet. Br. 41.

Amici are concerned that the decision below harms the many members of the Crow Tribe who rely on traditional subsistence hunting to feed and nourish their families during the winter. Given the scarcity and expense of healthy foods on the Crow reservation, the need for subsistence hunting is pronounced. Without access to a regular supply of fresh meat, the health of the Crow Tribe's members will suffer. To avoid these unnecessary public-health consequences, this Court should reverse the decision below and restore the Crow Tribe's usufructuary rights. The United States has enjoyed the benefits of the Second Treaty of Fort Laramie for 150 years, and this Court should prohibit the State of Wyoming from destroying the rights of the Crow Tribe secured under the treaty.

ARGUMENT

I. The Crow Tribe's Right To Hunt Is Protected In Treaties With The United States.

This case turns on the continued viability of the last of a series of treaties between the Crow Tribe and the United States, called the Second Treaty of Fort Laramie, signed in 1868. The Tribe agreed to cede a significant amount of territory under the treaty, but took care to preserve its right to continue hunting on unoccupied lands. That right remains vitally important to the Crow way of life and to the health of the Crow Tribe's members.

1. The Crow Tribe migrated to what is now southern Montana and northern Wyoming centuries ago. *See Montana v. United States*, 450 U.S. 544, 547 (1981). In 1825, "[t]he United States agree[d] to receive the Crow tribe of Indians into their friendship [and] protection." Treaty with the Crow Tribe, U.S.-Crow, art. 2, Aug. 4, 1825, 7 Stat. 266, 1825 WL 3194. The United States undertook to regulate trade with the Tribe, *see id.* arts. 3–4, and to punish private violence against its members, *see id.* art. 5. In return, the Tribe acknowledged the supremacy of the United States, *see id.* art. 1, promised not to supply weapons to enemies of the United States, *see id.* art. 6, and committed to protect traders and others "authorized by the United States to pass through their country," *see id.* art. 4. This first treaty did not purport to define "the limits of [the Tribe's] district of country," *id.*, or to constrain tribal hunting. *Cf. United States v. Winans*, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the

Indians, but a grant of right[s] from them,—a reservation of those not granted.").

In 1851, "warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie." *Montana*, 450 U.S. at 547. The signatory tribes agreed "to make an effective and lasting peace" among themselves, to give safe passage to settlers heading for California, and to "acknowledge [designated] tracts of country . . . as their respective territories." Treaty of Fort Laramie, arts. 1, 4, 5, Sept. 17, 1851, 11 Stat. 749, 1851 WL 7655, *reprinted in* 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 594–96 (1904); *see also id.* arts. 2, 3, 7, 8 (assigning rights and obligations to the United States). Reflecting the long-settled priorities of its people, the Crow Tribe refused to "surrender the privilege of hunting, fishing, or passing over" the territory that was designated for the other tribes. *See id.* art. 5. The designated Crow territory, confined to roughly 38.5 million acres in present-day Montana and Wyoming, was likewise subject to the usufructuary rights of the other tribes. *See id.*; *Montana*, 450 U.S. at 548; *United States v. Finch*, 395 F. Supp. 205, 215 (D. Mont. 1975), *rev'd*, 548 F.2d 822 (9th Cir. 1976), *vacated and remanded*, 433 U.S. 676 (1977) (mapping Crow territory circa 1851).

By 1867, continuing bloodshed in the West prompted the United States to create the Great Peace Commission, which negotiated nine separate peace treaties with various tribes. The Crow Tribe signed one of those peace treaties in 1868, known as the Second Treaty of Fort Laramie. *See* Treaty with

the Crow Tribe, U.S.-Crow, art. I, May 7, 1868, 15 Stat. 649, 1868 WL 24283. The treaty established a reservation on roughly 8 million acres in present-day Montana that would be "set apart for the absolute and undisturbed use and occupation of" the Crow Tribe, and on which the United States was to build a school and other buildings. *See id.* arts. II, III. The other 30 million or so acres of Crow territory were ceded to the United States. *See id.* art. II; *Montana*, 450 U.S. at 548; *United States v. N. Pac. Ry. Co.*, 311 U.S. 317, 354 (1940); *Finch*, 395 F. Supp. at 216 (mapping the Crow reservation circa 1868). A portion of the ceded lands would later become the Bighorn National Forest. *See* Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897).

Crucially for purposes of this case, the Second Treaty of Fort Laramie "addressed hunting rights specifically" with respect to the "lands outside the reservation boundaries." *Montana*, 450 U.S. at 559 n.7. The Crow Tribe agreed to make a permanent home on the much smaller reservation in exchange for the continuing "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Treaty with the Crow Tribe, U.S.-Crow, art. IV, May 7, 1868, 15 Stat. 649, 1868 WL 24283. The United States was willing to exchange hunting rights for peace and millions of acres of land .

The Crow Tribe zealously guarded its preexisting usufructuary rights in the treaties that shrank its territory down to 38.5 million acres, and then down to 8 million acres. Given the central importance of

hunting on the ceded lands to the Crow way of life, it is hardly surprising that the Tribe insisted that the right to hunt be expressly protected in both the First and Second Treaties of Fort Laramie. As Justice Brown wrote of the Bannock Tribe:

> The right to hunt was not one secured to [the Indians] for sporting purposes, but as a means of subsistence. . . . [T]heir chief reliance for food has been upon the chase. The right to hunt on the unoccupied lands of the United States was a matter of supreme importance to them, and, as a result of being deprived of it, they can hardly escape becoming a burden upon the public.

Ward v. Race Horse, 163 U.S. 504, 518 (1896) (Brown, J., dissenting). In fact, members of the Crow Tribe were so determined to retain their treaty rights, they agreed to serve as scouts for the United States Army in the Plains Indian Wars, including at the Battle of the Little Bighorn. Having sacrificed so much to protect the right to hunt, members of the tribe greatly value off-reservation hunting on the ceded lands, particularly in the Bighorn Mountains.

2. The Crow Tribe should not be stripped of its usufructuary hunting rights, which the United States recognized in the Second Treaty of Fort Laramie and for which the Crow fought alongside Custer to preserve. Contrary to the decision below, and as petitioner explains, no justification for clawing back this treaty right can be found in *Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1994), *aff'd* 73 F.3d 982 (10th Cir. 1995). That case held that under *Race Horse*'s equal-footing doctrine,

Wyoming's admission to the Union in 1890 repealed the Crow Tribe's right to hunt under the Second Treaty of Fort Laramie. *See* 866 F. Supp. at 524 (relying on *Ward v. Race Horse*, 163 U.S. 504 (1896)); 73 F.3d at 987–93 (same). A circuit split over this vital issue quickly emerged, leading to a grant of certiorari within three short years. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 926–29 (8th Cir. 1997), *cert. granted*, 524 U.S. 915 (1998) (No. 97-1337). The Crow Tribe, which had been shocked by *Repsis*, joined an amicus brief arguing that *Race Horse* should be overruled. *See* Brief of National Congress of American Indians, et al. as Amici Curiae Supporting Respondents, *Minnesota v. Mille Lacs Band of Chippewa Indians*, No. 97-1337, 1998 WL 664966 (U.S. Sept. 25, 1998).

This Court agreed with the Crow Tribe, broadly holding that *Race Horse* "rested on a false premise" and that "[t]reaty rights are not impliedly terminated upon statehood." *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202–08 (1999); *see also id.* at 219–20 (Rehnquist, C.J., dissenting) (lamenting that the majority "effectively overrules *Race Horse sub silentio*"). Because the Supreme Court fatally undermined *Repsis*, the Crow Tribe advised federal and state officials that its "policy . . . shall be to exercise fully its treaty right to hunt on all unoccupied lands of the United States . . . located within the traditional Crow homeland," under the Second Treaty of Fort Laramie. *See* Crow Tribal Legislature, Joint Action Resolution No. 13-09 (May 7, 2013), *available at* https://goo.gl/sbo1Gj (observing that *Mille Lacs* "squarely rejected" *Repsis*).

To be sure, in the *Repsis* case the Tenth Circuit offered an alternative basis for extinguishing the Crow Tribe's right to hunt that was not addressed by the district court, but this Court should also reject that position. The Tenth Circuit wrongly stated that the Bighorn National Forest is not "unoccupied" within the meaning of the Second Treaty of Fort Laramie. *See Repsis*, 73 F.3d at 993. That conclusion was erroneous because the United States explicitly restricts occupancy of national forest lands. *See, e.g.*, 16 U.S.C. §§ 475, 551, 1604(*i*); 36 C.F.R. § 261.10; Proclamation No. 30, 29 Stat. 909–10 (Feb. 22, 1897); *United States v. Backlund*, 689 F.3d 986, 990 (9th Cir. 2012). Little wonder, then, that no other court besides the Tenth Circuit in *Repsis* and the courts below in this case have held that creation of a national forest abrogates Indian treaty rights. *See, e.g.*, *Confederated Tribes of Umatilla Indian Reservation v. Maison*, 262 F. Supp. 871, 873 (D. Or. 1966), *aff'd sub nom. Holcomb v. Confederated Tribes of Umatilla Indian Reservation*, 382 F.2d 1013 (9th Cir. 1967) (holding that national forest lands are "not occupied by white settlers," and thus are "unclaimed" within the meaning of a treaty that reserved usufructuary rights); Pet. 24–27 (collecting additional cases). It makes no sense to say that "creation of the Big Horn National Forest resulted in the 'occupation' of the land"—unless perhaps the elk are the occupants. *Repsis*, 73 F.3d at 993. This fact was recognized by United States in its certiorari-stage brief in this litigation, noting that "the fact that an area has been designated as a National Forest does not render that area occupied. Quite the opposite, the creation of the Bighorn National Forest meant

that those 'lands were no longer available for settlement.'" Brief of the United States as Amicus Curiae at 5, *Herrera v. Wyoming*, (No. 17-534) (quoting *Repsis*, 73 F.3d at 993). Accordingly, the opinion below should be reversed.

II. Retracting The Right To Hunt Threatens Public Health On The Crow Reservation.

The decision below poses a dire threat to the health of the members of the Crow Tribe by curtailing their longstanding right to hunt outside the reservation protected under the Second Treaty of Fort Laramie. The Crow Tribe continues to rely on "the off-reservation hunting right reserved in the 1868 Treaty" to feed their families. Pet. Br. 45.

1. For centuries, the Crow Tribe has enjoyed a heavily meat-based diet that includes bison, elk, deer, antelope, and other wild game. Robert H. Lowie, THE CROW INDIANS at xiv, 72 (2d ed. 1958); Thomas Yellowtail, YELLOWTAIL: CROW MEDICINE MAN AND SUN DANCE CHIEF, AN AUTOBIOGRAPHY 45 (Michael Oren Fitzgerald ed. 1991). Without these traditional food sources, "the Crow people would never have survived life on the plains." Alma Hogan Snell, A TASTE OF HERITAGE: CROW INDIAN RECIPES & HERBAL MEDICINES 67 (2006). "Without it they would [have] quickly perish[ed]." Yellowtail, *supra* at 45. Elk became particularly important as bison herds dwindled, offering a steady source of fresh meat, hides, and the eponymous component of the prized elk-teeth dress. *See, e.g.*, James Hagengruber, *Elk-Teeth Dress is Epitome of Crow Status and Style*, BILLINGS GAZETTE, Apr. 13, 2002, https://goo.gl/iyVc34. The Bighorn Mountains of Wyoming, located

within the Bighorn National Forest that was made with a portion of the Tribe's ceded lands, are particularly important to the Crow Tribe because they are the sacred hunting grounds according to Crow oral tradition.[2] It was in these mountains, at a place known to the Crow Tribe hunters as Aashawua (Round Valley), that petitioner killed the elk.

2. The sacred nature of the Bighorn Mountains for the Crow Tribe dates back to the Crow migration to Wyoming and Montana. Sacred tobacco was found by the first leader of the Crow Tribe at the base of Cloud Peak in what is now the Wyoming Bighorn Mountains. *See* Crow Tribe of Indians, *Culture and History*, *in* CROW INDIAN RESERVATION NATURAL, SOCIO-ECONOMIC AND CULTURAL RESOURCES ASSESSMENT AND CONDITIONS REPORT 43 (2002), *available at* https://deq.mt.gov/Portals/112/Energy/CoalbedMethane/Documents/CrowNarrative.pdf. The

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[2] Oral histories are an important repository of cultural information "both as a form of history and as [a] form of traditional literature." Bruce Miller, ORAL HISTORY ON TRIAL: RECOGNIZING ABORIGINAL NARRATIVES IN THE COURTS 137 (2011) (quoting Judith Berman, *"Some Mysterious Means of Fortune": A look at North Pacific Coast Oral History*, *in* COMING TO SHORE: NORTHWEST COAST ETHNOLOGY, TRADITIONS, AND VISIONS 129 (Marie Mauze, Michael E. Harkin, & Sergei Kane eds., 2004). "[T]he narratives often contain a great deal of what would, from a Western standpoint, be considered accurate historical information." *Id.* (quoting Berman, *supra* at 130). These histories are passed down "based on protocols of respect and connection to persons of authority" in their society. *Id.* at 137.

Bighorns were thereafter considered sacred and became the center of the historic Crow territory.

The Bighorn Mountains, Bighorn Canyon, and Bighorn River received their names from the story of Big Metal. Crow Tribe Exhibit 75, Joint Appendix, *Montana v. United States*, 450 U.S. 544 (1981) (No. 79-1128), 1980 U.S. S. Ct. Briefs LEXIS 1901, at *90–101. According to oral tradition, a Crow boy was stranded in the mountains and seven bighorn rams rescued him. *Id.* at *91–96. The bighorn rams shared their powers with the boy, and the leader of the rams, gave the boy his own name (Big Metal). *Id.* at *96–97. The boy grew up to become a powerful chief among the Crow people. *Id.* at *101. The rams promised that the Crow people would continue as long as the names of the Bighorn Mountains, the Bighorn Canyon, and the Bighorn River remained unchanged. *Id.* at *97. The rams also promised that hunters from the Tribe would always find plentiful game by visiting the Bighorn Mountains and thinking about the rams who saved Big Metal. *Id.* at *99.

Consistent with oral tradition, the Crow Tribe has protected the Bighorn name. After Yellowtail Dam was built in Bighorn Canyon, the United States government planned to name the reservoir Yellowtail Reservoir. *Id.* at *102–03. The Crow Tribe lobbied the government to ensure that the waters would continue to bear the name of Bighorn. *Id.* Today, the reservoir is known as Bighorn Lake. *See* https://www.nps.gov/bica/planyourvisit/bighorn-lake-in-wyoming-and-montana.htm.

3. Members of the Crow Tribe continue to hunt as they "still need meat, because it is difficult to afford the basic things [they] need to survive." Yellowtail, *supra* at 45. Members of the tribe hunt elk in the Bighorn Mountains and beyond to put "food on [their] table during unforgiving Big Sky winters." Pet. Br. 45; *see also* Frederick E. Hoxie, PARADING THROUGH HISTORY: THE MAKING OF THE CROW NATION IN AMERICA, 1805–1935 at 300–01 (1995) (noting the Crow Tribe's practice of venturing into the Bighorn Mountains to hunt and to gather berries). Traditionally, elk is served to respected guests as the main ingredient in "dry meat stew" or "elk soup." *See* App. A & D, *infra* at a1, a4. Amici also use elk to make sausage and choke cherry Christmas balls. *See* App. B & C, *infra* at a2, a3. All parts of the animal are utilized, and there are traditional Crow recipes for the loin, flank, brisket, shoulder, liver, kidneys, heart, neck, ribs, entrails, and tongue. Joy Yellowtail Toineeta, Absarog-Issawua (from the Land of the Crow Indians) 64–78 (Aug. 1970) (unpublished M.Ed. thesis, Montana State University), *available at* https://scholarworks.montana.edu/xmlui/handle/1/11101. Any way you slice it, elk meat is good, wholesome, and traditional food, packed with healthy lean protein. *See, e.g.*, Peggy Halpern, *Obesity and American Indians / Alaska Natives* 17 (Apr. 1, 2007), *available at* https://goo.gl/za6k71 (noting that "traditional foods are high in protein and low in fat and sugar").

Losing access to off-reservation elk and other game will be especially harmful on the Crow reservation, which is located in a "food desert." The U.S. Department of Agriculture ("USDA") defines

"food deserts" as areas that are low income and where there is low access to healthy food. *See* https://www.ers.usda.gov/data-products/food-access-research-atlas/documentation/#definitions. According to USDA data, the Crow reservation is located in one of the most severe food deserts, where many residents are located more than twenty miles from a supermarket and where access to motor vehicles is low. *See* https://www.ers.usda.gov/data-products/food-access-research-atlas/go-to-the-atlas/ (enter "Crow Agency, MT, USA" in search box and select "LI and LA at 1 and 20 miles" and "LI and LA using vehicle access"). Even members of the Tribe with money to spend, then, have a hard time obtaining fresh meat and vegetables at a well-stocked grocery store within easy traveling distance.

The Crow reservation is not unique in this regard: "In Indian Country, access to food can be a challenge. Many reservations have significant food deserts . . . [and] significantly higher levels of food insecurity than the rest of the population . . ." Anne Gordon & Vanessa Oddo, *Addressing Child Hunger and Obesity in Indian Country: Report to Congress* 5 (Jan. 12, 2012), *available at* https://goo.gl/iVZPLa. The USDA defines food insecurity as a lack of access "at all times to enough food for an active, healthy life." *See* https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us. Researchers have found that rates of food insecurity among American Indians are twice as high as other populations in the United States. Kelly Berryhill, et al., *Food Security and Diet Among American Indians in the Midwest*, J. OF CMTY. HEALTH, 43(5):901-907 (Oct. 2018). Studies suggest prevalence rates of food

insecurity ranging from nearly 40 percent on one reservation, Katherine W. Bauer, et al., *High Food Insecurity and its Correlates Among Families Living on a Rural American Indian Reservation*, 102 AM. J. OF PUB. HEALTH 1346, 1346–52 (2012), to as high as 61 percent across a group of five American Indian communities, Emily J. Tomayko, et al., *Household Food Insecurity and Dietary Patterns in Rural and Urban American Indian families with Young Children*, 17 BMC PUB. HEALTH 611 (2017).

4. Food insecurity is correlated with a number of public health and medical problems. Children, especially young children, who are food insecure display increased incidence of acute illness, iron deficiency, behavioral and developmental problems, impaired language and motor skills, poor school performance, and lower education attainment. Craig Gundersen & James P Ziliak, *Food Insecurity and Health Outcomes*, 34 HEALTH AFFAIRS 1830, 1830–39 (2015). Children experiencing food insecurity are more likely to eat meals from convenience stores, Bauer *supra* at 1346–52, and are more likely to drink soda, consume sports drinks, and eat fried potatoes. Tomayko, *supra* at 611. These unhealthy foods are often less expensive and more accessible on the reservations than healthier options.

Food insecurity is also associated with adverse health outcomes in adults. Food insecurity increases the risk of chronic diseases, including obesity, type 2 diabetes, and hypertension. Nicholas J. Bishop & Kaipeng Wang, *Food Insecurity, Comorbidity, and Mobility Limitations Among Older U.S. Adults: Findings from the Health and Retirement Study and*

Health Care and Nutrition Study, 114 PREVENTIVE MED. 180, 180–87 (2018). Researchers have found that American Indians are 2.4 times more likely to have diabetes, 1.9 times more likely to be obese, and 1.7 times more likely to be in poor or fair health, compared to the non-Hispanic white population. Andrew M. Subica, et al., *Obesity and Associated Health Disparities Among Understudied Multiracial, Pacific Islander, and American Indian Adults*, 25 OBESITY 2128, 2128–36 (2017).

A contributing factor to an increase in diabetes and obesity is that "there has been a shift in Indian Country, whereby American Indians are eating less traditional food and more food that is commercially prepared and processed." Gordon, *supra* at 9. American Indians historically have supplemented their diets through hunting and fishing and growing their own fruits and vegetables. Mary Story, et al., *Nutritional Concerns in American Indian and Alaska Native Children: Transitions and Future Directions*, 98 J. OF THE AM. DIETETIC ASS'N 170, 170–76 (1998). Traditional foods like wild game are slowly being replaced by less healthy processed and convenience foods. Charlene Compher, *The Nutrition Transition in American Indians*, 17 J. OF TRANSCULTURAL NURSING 217, 217–23 (2006). Lean meat obtained from hunting provides a healthy supply of protein and does not convey the same risk for obesity and cardiovascular disease associated with meat from modern domesticated animals that are high in saturated fat. Neil Mann, *Dietary Lean Red Meat and Human Evolution*, 39 EUROPEAN JOURNAL OF NUTRITION 71, 71–79 (2000).

Moreover, the subsistence lifestyle is grueling, with extensive physical activity requirements. Research has shown that hunting on foot has a high metabolic equivalent value beneficial to cardiovascular health. Diana Redwood, et al., *Physical Activity Patterns of American Indian and Alaskan Native People Living in Alaska and the Southwestern United States*, 23 AM. J. HEALTH PROMOT. 388, 388–95 (2009). "The physical activity involved in traditional activities, including food harvesting, combined with the high nutritional value of Native foods may provide a double benefit to decreasing the risks for chronic disease." *Id.* This principle is recognized by a leading federal agency:

> The Centers for Disease Control and Prevention (CDC) is committed to endorsing traditional foods as an effective approach for health promotion and diabetes prevention in American Indian and Alaska Natives ... Hunting and fishing rights are significant in a public health context because many tribal communities rely on these traditional foods for subsistence.

CDC Office for State, Tribal, Local & Territorial Support, *American Indian and Alaska Native Hunting and Fishing Rights*, available at http://goo.gl/LxSYv9. More than a century ago, the Court wrote that usufructuary rights "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *Winans*, 198 U.S. at 381. As the CDC attests, those rights remain important to the health and well-being of native populations.

* * *

The Second Treaty of Fort Laramie, now celebrating its sesquicentennial, has been a boon for the United States, which received peace in the aftermath of the Civil War along with 30 million acres of Crow territory, a small part of which became what is now the Bighorn National Forest. Wyoming seeks to deprive the Crow Tribe of its rights under that federal treaty. That is wrong. The Crow Tribe should be allowed to continue subsistence hunting in the forest lands it ceded away. Notwithstanding the decision below and *Repsis*, there is no basis in precedent, policy, or common sense for depriving the Tribe of its essential treaty rights.

CONCLUSION

The opinion below from the District Court of Wyoming should be reversed.

Respectfully submitted,

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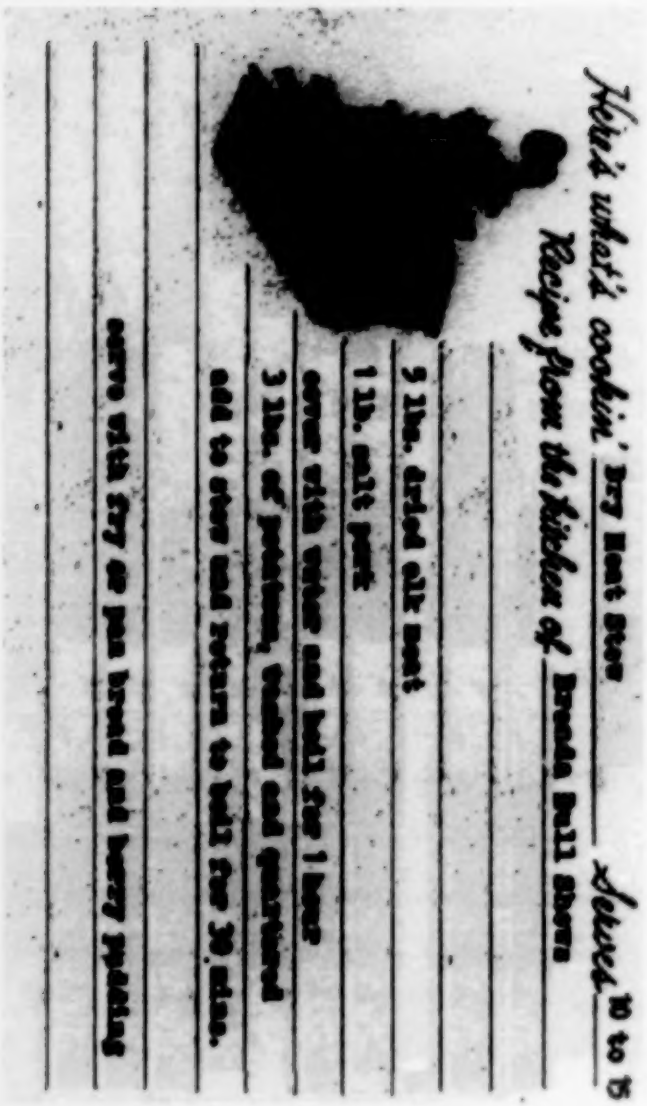
September 11, 2018

APPENDICES

Appendix A



Here's what's cookin' Dry Heat Stew Serves 10 to 15

Recipe from the Kitchen of Brenda Bull Shoes

5 lbs. dried elk meat

1 lb. salt pork

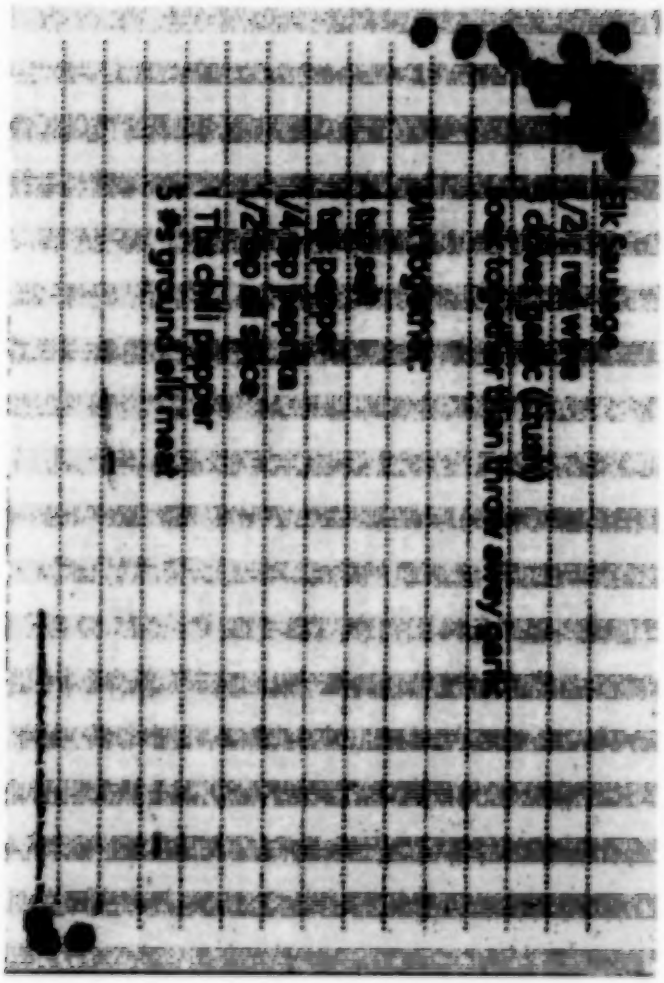
cover with water and boil for 1 hour

3 lbs. of potatoes, cubed and quartered

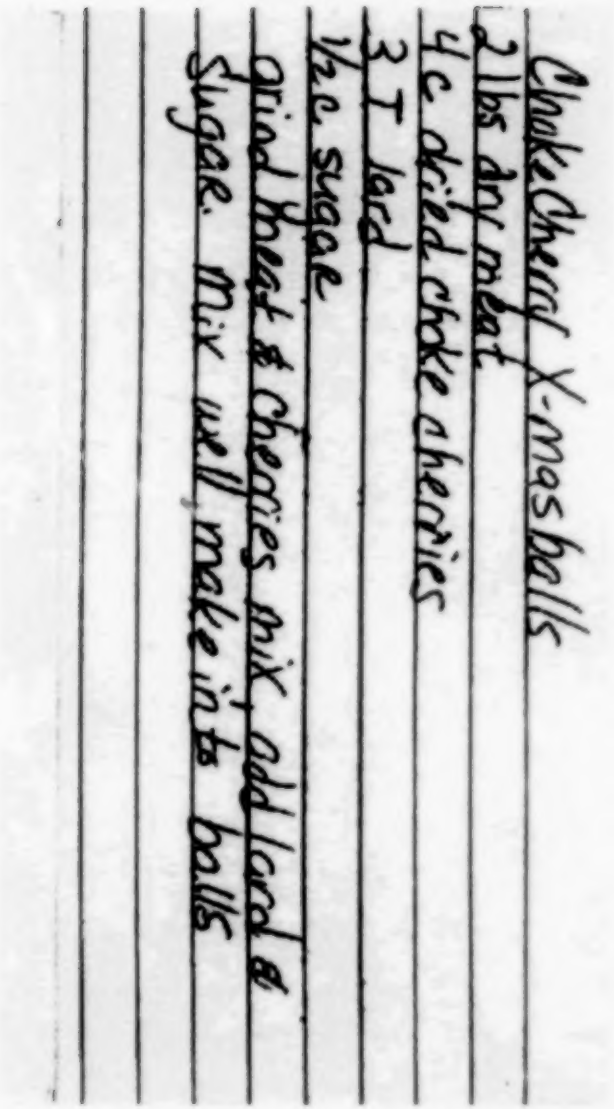
add to stew and return to boil for 30 min.

serve with fry or pan bread and berry pudding

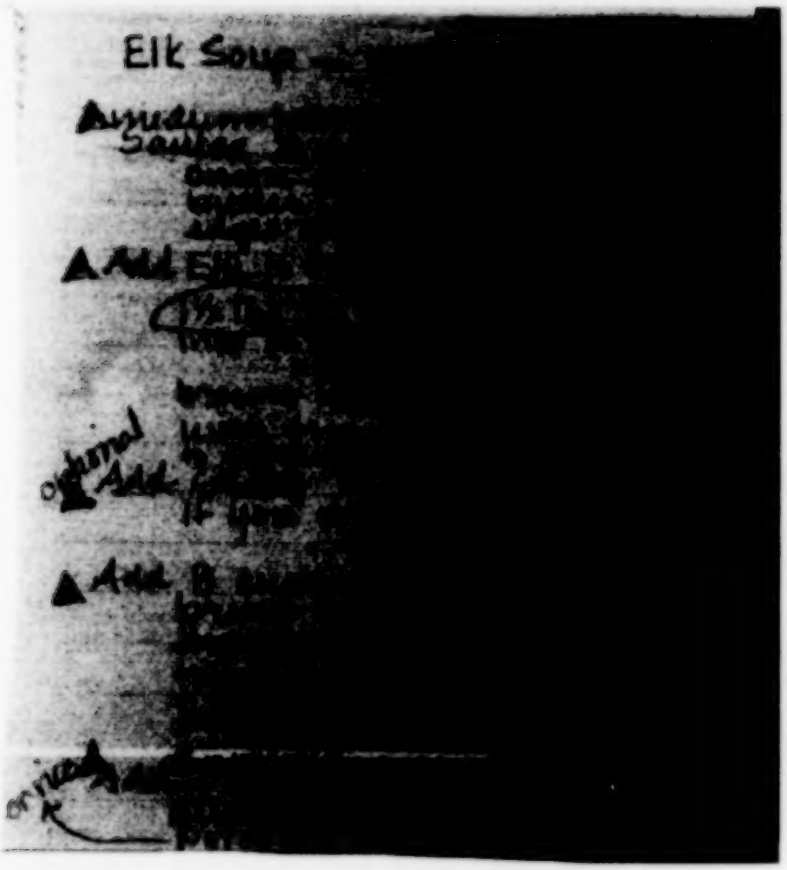
Appendix B



Appendix C


Choke Cherry X-mas balls
2 lbs dry meat
4 c. dried choke cherries
3 T lard
½ c. sugar
grind meat & cherries mix, add lard &
sugar. Mix well, make into balls

Appendix D*



* This recipe for elk soup is a written version of a recipe passed down to *amici* through oral tradition.

No. 17-532

In The
Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ Of Certiorari To The District Court Of Wyoming, Sheridan County

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Bad River Band of the Lake Superior Tribe of Chippewa (Wisconsin)

Bay Mills Indian Community (Michigan)

Fond du Lac Band of Lake Superior Chippewa (Minnesota)

Grand Traverse Band of Ottawa and Chippewa Indians (Michigan)

Great Lakes Indian Fish and Wildlife Commission (Michigan, Minnesota and Wisconsin)

Lac Courte Oreilles Band of Lake Superior Chippewa Indians (Wisconsin)

Lac du Flambeau Band of Lake Superior Chippewa Indians (Wisconsin)

Little River Band of Ottawa Indians (Michigan)

Keweenaw Bay Indian Community (Michigan)

Mille Lacs Band of Ojibwe (Minnesota)

Mole Lake Sokaogon Chippewa Community (Wisconsin)

Red Cliff Band of Lake Superior Chippewa Indians (Wisconsin)

Sault Ste. Marie Tribe of Chippewa Indians (Michigan)

St. Croix Chippewa Indians of Wisconsin (Wisconsin)

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INTEREST OF *AMICI CURIAE*[1]

The National Congress of American Indians (NCAI) is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian tribes and Alaskan Native villages. Since 1944, NCAI has advised tribal, state and federal governments on a range of Indian issues, including the relevance and legal interpretation of treaties reserving off-reservation hunting, fishing and gathering rights and the regulation of such reserved rights under this Court's conservation-necessity standard. The additional *amici* listed on the inside cover of this brief comprise an intertribal organization and individual tribes, all of whom hold off-reservation hunting, fishing and gathering rights under pre-statehood treaties. The additional *amici* recognize federal and state authority to regulate the exercise of such rights under the conservation-necessity standard, but, in cooperation with the Federal Government and the States, have elected to adopt and enforce their own ordinances to conserve natural resources. *Amici* have a direct and substantial interest in the preservation of pre-statehood off-reservation hunting, fishing and gathering rights and in the reconciliation of such rights with federal and state interests in conservation.

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[1] No counsel for any party authored this brief in whole or in part. No person or entity, other than *amici*, their members, and their counsel provided any monetary contribution to fund the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of *amicus* briefs.

SUMMARY OF ARGUMENT

In the decision below, the District Court for Wyoming's Fourth Judicial District interpreted this Court's decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). The Wyoming District Court acknowledged that *Mille Lacs* had rejected the holding in *Ward v. Race Horse*, 163 U.S. 504 (1896), that hunting rights secured to an Indian tribe in a pre-statehood treaty are terminated at statehood under the equal footing doctrine. Pet. App. 23. However, the Wyoming District Court read *Mille Lacs* to leave intact an alternative holding from *Race Horse* under which such rights are not intended to survive statehood if they are subject to termination upon the happening of a clearly contemplated event—even where, as here, the clearly contemplated event itself is unrelated to statehood. *See* Pet. App. 23-24.

This brief addresses the Wyoming District Court's clearly-contemplated-event standard and shows that it is based on a misreading of *Mille Lacs* and is inconsistent with more than a century of this Court's decisions. First, it is contrary to the plain language of the Crow Treaty at issue in this case. Like the Chippewa Treaty at issue in *Mille Lacs*, the Crow Treaty "itself defines the circumstances under which the rights would terminate," *Mille Lacs*, 526 U.S. at 207, and statehood is not among them. The implication of additional, unrelated circumstances under which the rights would terminate (such as statehood) rewrites the treaty in defiance of rules of construction applicable to all treaties and statutes.

Second, as the *Mille Lacs* Court held, *Race Horse*'s alternative holding that the Senate did not intend the hunting right in the Bannock Treaty to survive statehood—even though the Treaty itself did not say so—"was informed by that Court's conclusion that the Indian treaty rights were inconsistent with state sovereignty over natural resources and thus that Congress (the Senate) could not have intended the rights to survive statehood." *Id.* at 207-08. However, as the *Mille Lacs* Court explained, that was a "false premise," which had been rejected in more than a century of this Court's cases. *Id.* at 204. Those cases make clear that the States share sovereign authority over natural resources with the Federal Government, and that, when the Federal Government exercises one of its enumerated powers—including but not limited to its powers to make treaties and regulate commerce with the Indian tribes and to make laws regarding its property and territory—it does not infringe on the sovereign rights of the States. Thus, there is no basis on which to infer that the Senate intended the rights to terminate upon statehood.

Third, as the *Mille Lacs* Court also explained, *id.* at 204-05, this Court has reconciled Indian off-reservation treaty rights with state interests in natural resources through the conservation-necessity doctrine. Under that doctrine, states may regulate the exercise of off-reservation Indian hunting, fishing and gathering rights when they can demonstrate that such regulation, as applied to Indians, is reasonable and necessary to preserve natural resources. The

experience of the *amici* tribes in Michigan, Wisconsin and Minnesota, described in detail below, demonstrates that, although demanding, the conservation-necessity standard has worked extremely well in practice: it has led to effective tribal regulation of hunting, fishing and gathering by tribal members and cooperative agreements among Tribes, States and the Federal Government that have *improved* the management of natural resources for the benefit of Indians and non-Indians alike. There is no reason to believe that recognition of the Crow Tribe's hunting rights will lead to any different result: either the Tribe will adopt and enforce its own regulations to conserve natural resources (likely in cooperation with the State) or the State will retain the authority to regulate the exercise of the right upon making a proper showing under the conservation-necessity doctrine (something it has not done in this case).

Under these circumstances, it is not enough that the hunting right in the Crow Treaty was tied to *some* "clearly contemplated" event; unless that event was inextricably linked with statehood itself, there is no basis on which to imply that either party to the Treaty intended the treaty right to terminate upon *statehood*—as opposed to upon occurrence of a "clearly contemplated" event actually identified in the Treaty. As the *Mille Lacs* Court held, "[t]reaty rights are not impliedly terminated upon statehood." 526 U.S. at 207. And, absent a clear link to statehood, the Wyoming court's clearly-contemplated-event standard is no different than the "temporary and precarious" standard

rejected in *Mille Lacs* because it is not "useful as a guide to whether treaty rights were intended to survive statehood." *Id.* at 207.

ARGUMENT

I. IN ADOPTING ITS CLEARLY-CONTEMPLATED-EVENT STANDARD, THE WYOMING DISTRICT COURT MISREAD *MILLE LACS*.

Article 4 of the Treaty with the Crow Indians, 15 Stat. 649 (1868), provides that the Indians:

> shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

In the decision below, Wyoming District Court held that, in *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), the Tenth Circuit conclusively determined that this right was terminated when Wyoming was admitted to the Union. Pet. App. 10-18.

The Wyoming District Court recognized that *Repsis* was largely based on *Race Horse*, which interpreted identical language in a treaty with the Bannock Indians. Pet. App. 21. And, the Wyoming District Court acknowledged that *Race Horse*'s holding that Wyoming's admission to the Union "was inconsistent with the rights granted in the treaty" under the equal

footing doctrine "has subsequently been rejected by numerous cases." *Id.*

However, the Wyoming District Court asserted that *Race Horse* also found that the hunting right was "'temporary and precarious' in nature" and "'essentially perishable, and intended to be of a limited duration.'" *Id.* (*quoting Race Horse*, 163 U.S. at 510, 515). According to the Wyoming District Court, despite the rejection of *Race Horse*'s reliance on the equal footing doctrine in many cases, "the 'temporary and precarious' doctrine remained alive and well." *Id.*

In so holding, the Wyoming District Court relied on this Court's decision in *Mille Lacs*. According to the Wyoming District Court, although *Mille Lacs* "again rejected the equal footing doctrine of *Race Horse*," it "acknowledged that the *Race Horse* court had 'also announced an alternative holding: The treaty rights at issue were not intended to survive Wyoming's statehood.'" Pet. App. 23 (*quoting Mille Lacs*, 526 U.S. at 206). The Wyoming District Court acknowledged *Mille Lacs*' holding that "'[t]he 'temporary and precarious' language in *Race Horse* is too broad to be useful in distinguishing rights that survive statehood from those that do not,'" but asserted that the *Mille Lacs* Court "did not completely reject the temporary and precarious doctrine." *Id.* (*quoting Mille Lacs*, 626 U.S. at 206).

According to the Wyoming District Court, the *Mille Lacs* Court "affirmed the concept that certain treaties, like the one in *Race Horse*, were intended to terminate upon the happening of a 'clearly contemplated' event."

Pet. App. 24 (*quoting Mille Lacs*, 526 U.S. at 207). According to the Wyoming District Court, because *Mille Lacs* "affirmed the concept that a court interpreting a treaty must determine if the rights reserved in the treaty were intended to be perpetual or if they were intended to expire upon the happening of a 'clearly contemplated event,'" *Repsis*'s reliance on *Race Horse* to hold that hunting rights such as those in the Crow Treaty were intended to terminate at statehood remained conclusive in this case. *Id.*

In *Mille Lacs*, this Court concluded that the usufructuary rights secured in a pre-statehood Chippewa treaty were not intended to terminate at statehood. In addition to noting that the treaty did not tie the termination of those rights to a clearly contemplated event, the Court explained that the treaty expressly identified the circumstance under which the rights would terminate, and that circumstance was not linked to statehood. 526 U.S. at 207. In addition, the Court explained that *Race Horse*'s alternate holding that the pre-statehood Bannock hunting right was intended to terminate on statehood was based on the premise that Indian hunting rights are incompatible with state sovereignty. *Id.* at 207-08. However, as the Court also explained, that was a false premise, which had been rejected in more than a century of this Court's post-*Race Horse* decisions. *Id.* at 204.

The Wyoming District Court did not mention either of these aspects of this Court's decision in *Mille Lacs*. As a result and as discussed in detail below, its clearly-contemplated-event standard is based on a

misreading of *Mille Lacs* and is inconsistent with more than a century of this Court's decisions.

II. THE CROW TREATY EXPRESSLY IDENTIFIES THE CIRCUMSTANCES UNDER WHICH THE HUNTING RIGHT TERMINATES AND STATEHOOD IS NOT AMONG THEM.

Under Article 4 of the Crow Treaty, the Indians:

> have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

This Article expressly identifies the circumstances under which the hunting right terminates, and statehood is not among them. The existence of express provisions for termination of the right that are not tied to statehood demonstrates that the parties did *not* intend the right to terminate upon statehood. *See Mille Lacs*, 526 U.S. at 207.

The first circumstance under which the Crow hunting right terminates is when the lands are no longer "unoccupied lands of the United States." Because the United States was under no obligation to either relinquish or provide for the occupation of its lands upon statehood, this circumstance was not tied to statehood.

Although title to public lands was and is an important component of state sovereignty, the Federal

Government chose to exercise its constitutional authority to retain title to public lands in the western Territories when they were admitted to the Union. *See* U.S. Const. art. IV, § 3, cl. 2 (authorizing but not requiring Congress "to dispose of . . . the Territory or other Property belonging to the United States," and also authorizing Congress to "make all needful Rules and Regulations respecting" such Territory and Property); *United States v. Texas*, 339 U.S. 707, 716 (1950) ("[s]ome States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil").

This Court has never questioned the Federal Government's authority to retain title to public lands upon statehood and (unlike the beds and banks of navigable waters) has not treated the retention of such lands as implicating the equal footing doctrine. *See Texas*, 339 U.S. at 716. To the contrary, it has made clear that the United States "*can withhold or reserve the land . . . indefinitely.*" *Light v. United States*, 220 U.S. 523, 536 (1911) (emphasis added); *see also United States v. Oregon*, 295 U.S. 1, 14, 27-28 (1935) (unlike the beds of navigable waters, Court does not presume Congress conveyed public lands to a State upon statehood); *Scott v. Lattig*, 227 U.S. 229, 244 (1913) (same); *United States v. Gratiot*, 39 U.S. 526, 537-38 (1840) (upholding continued application of law authorizing United States to lease lead mines in Territory after it became part of the State of Illinois).

Because the United States was not obligated to (and in fact did not) relinquish its ownership of public lands or provide for their immediate occupation upon Wyoming's statehood, the first circumstance identified in the Crow Treaty in which the hunting right terminates—when the lands are no longer the "unoccupied lands of the United States"—is not tied to statehood.

The second circumstance is when "game" is no longer "found" on the unoccupied lands of the United States. There is nothing in this language that is tied to statehood, and it is difficult to imagine that either the Crow Tribe or the United States assumed that the presence of game on the unoccupied lands of the United States would come to an end at statehood, if ever. Notably, 128 years after Wyoming became a State, game can still be found on the lands within the Bighorn National Forest, as the facts of this case attest.

The third and final circumstance expressed in the Crow Treaty under which the hunting right terminates is when "peace" no longer "subsists among the whites and Indians on the borders of the hunting districts." Again, there is nothing in this language that is tied to statehood. To the contrary, under this provision the hunting right continues during peaceful relations among whites and Indians on the borders of the hunting districts, relations that are in no way foreclosed by Wyoming's admission to the Union.

In sum, none of the circumstances expressly identified in the Crow Treaty under which the hunting

right would terminate is tied to statehood.[2] Thus, just as the presence of an express condition in the 1837 Chippewa Treaty that was unrelated to statehood led the *Mille Lacs* Court to reject the proposition that the Senate intended the Treaty's usufructuary rights to terminate on statehood, 526 U.S. at 207, so here the presence of express conditions on the hunting right in the Crow Treaty that are unrelated to statehood leads to the conclusion that the Senate did not intend the Crow Tribe's hunting right to terminate on statehood.

Rules of construction applicable to all treaties and statutes reinforce this conclusion. First, the inclusion of express conditions in an instrument normally precludes the implication of additional, unrelated conditions. *See, e.g., Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)") (*quoting* A. Scalia & B. Garner, Reading Law 107 (2012)); *accord O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

Second, it is a cardinal rule that courts cannot "rewrite" or "remake" a treaty, nor ignore the plain

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[2] *See Race Horse*, 163 U.S. at 518 (Brown, J., dissenting) ("The fact that the territory of Wyoming would ultimately be admitted as a State must have been anticipated by Congress, yet the right to hunt was assured to the Indians, not until this should take place, but so long as game may be found upon the lands, and so long as peace should subsist on the borders of the hunting districts.").

meaning of a treaty's text. *E.g.*, *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) (treaties "cannot be rewritten or expanded beyond their clear terms"); *accord Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016) ("[I]t is not our role to 'rewrite' the 1882 Act in light of this subsequent demographic history."); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) (Court cannot "disregard clear language simply on the view that . . . Congress 'must have intended' something broader.").

Third, Indian treaty rights cannot be impaired absent "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 740 (1986). The *Mille Lacs* Court cited this rule and noted that the Act admitting Minnesota to the Union "provides no clue that Congress considered the reserved rights of the Chippewa and decided to abrogate those rights when it passed the Act." 526 U.S. at 202-03. The same is true here.

These basic rules of construction reinforce the *Mille Lacs* Court's holding that, where, as here, a treaty expressly identifies the circumstances under which usufructuary rights will terminate, the Senate intended the rights to terminate upon the happening of the *stated* conditions and did not intend them to terminate upon the happening of other *unstated* conditions such as statehood.

III. THE STATE'S INTERESTS IN NATURAL RESOURCES PROVIDE NO BASIS ON WHICH TO IMPLY THAT THE CROW HUNTING RIGHT TERMINATED AT STATEHOOD.

In the absence of an express provision for termination at statehood, the *Race Horse* Court held that the Bannock hunting rights "were *impliedly* repealed by Wyoming's statehood Act." *Mille Lacs*, 526 U.S. at 207 (emphasis added). As the *Mille Lacs* Court explained, this decision "was informed by [the *Race Horse*] Court's conclusion that the Indian treaty rights were inconsistent with state sovereignty over natural resources and thus that Congress (the Senate) could not have intended the rights to survive statehood." *Id.* at 207-08. "But," as the *Mille Lacs* Court further explained, "Indian treaty-based usufructuary rights are not inconsistent with state sovereignty over natural resources." *Id.* at 208; *see id.* at 204-05. The *Mille Lacs* Court's holding, and the substantial post-*Race Horse* precedent on which it was based, foreclose any attempt to find an implied repeal of the Crow Tribe's hunting right upon Wyoming's admission to the Union.

There is no doubt about "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource," such as the State's wildlife. *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979) (internal quotations omitted). "States have broad trustee and police powers over wild animals within their jurisdictions." *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976). Those powers are, however, subject to an important limitation: they "exist only 'in so

far as [their] exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution.'" *Id.* (*quoting Geer v. Connecticut*, 161 U.S. 519, 528 (1896)).

Accordingly, the States' regulatory authority over wildlife is limited by federal constitutional provisions, such as the Commerce Clause (*see Hughes*, 441 U.S. at 329-36) and the Privileges and Immunities Clause (*see Toomer v. Witsell*, 334 U.S. 385, 396-99 (1948); *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 385-86 (1978)). In addition, and most relevant here, the Supremacy Clause limits state power to regulate wildlife when the Federal Government legitimately exercises one of its enumerated powers to enter into treaties or make laws and regulations concerning wildlife. *See Kleppe*, 426 U.S. at 543 (Wild Free-Roaming Horses and Burros Act); *Hunt v. United States*, 278 U.S. 96, 100 (1928) (Federal regulation authorizing thinning of deer population in violation of State law).

This principle is fully applicable to limitations on state authority to regulate wildlife arising from a treaty with an Indian tribe. In *United States v. Winans*, the Court held that an Indian treaty securing the "right of taking fish at all usual and accustomed places" and "of erecting temporary buildings for curing them" gave the Indians "a right in the land,—the right of crossing it to the river,—the right to occupy it to the extent and for the purpose mentioned." 198 U.S. 371, 381 (1905). The Court explained that the "right was intended to be continuing against the United States and

its grantees as well as against the state and its grantees." *Id.* at 381-82.

In so holding, the Court rejected the contention "that the rights conferred upon the Indians are subordinate to the powers acquired by the state upon its admission to the Union." *Id.* at 382. Notwithstanding the importance of the State's interests, "the power of the United States, while it held the country as a territory, to create rights which would be binding on the states" had been settled in *Shively v. Bowlby*, 152 U.S. 1 (1894). *Winans*, 198 U.S. at 383. As the *Winans* Court explained:

> The extinguishment of the Indian title, opening the land for settlement, and preparing the way for future states, were appropriate to the objects for which the United States held the territory. And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places."

Id. at 384.[3]

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[3] The *Winans* Court adopted the views expressed by Justice Brown in his *Race Horse* dissent:

> Not doubting for a moment that the preservation of game is a matter of great importance, I regard the preservation of the public faith, even to the helpless Indian, as a matter of much greater importance. If the position of the court be sound, this treaty might have been abrogated the next day by the admission of Wyoming as a state, and what might have been done in this case might be done in the case of every Indian tribe

Winans left open the permissible scope of state regulation of the treaty right, noting only that the right does not "restrain the state unreasonably, if at all, in the regulation of the right." *Id.* The Court returned to that question in *Tulee v. Washington*, 315 U.S. 681 (1942). "Relying on its broad powers to conserve fish and game within its borders," the State claimed the right to impose nondiscriminatory license fees on Indian fishermen, while Tulee, a member of the Yakama Tribe, asserted the State had no authority to regulate his exercise of the treaty right at all. *Id.* at 683-84. The Court found that "the state's construction of the treaty [was] too narrow" and Tulee's construction "too broad"; instead, it held that, "while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here." *Id.* at 684 (footnote omitted). *Tulee* thus reaffirmed that restrictions on state authority to regulate wildlife that result from a treaty with an Indian tribe, just as those that result from another exercise of the Federal Government's enumerated powers, do not impair the sovereign rights of the States.

> within our boundaries. There is no limit to the right of the state, which may in its discretion prohibit the killing of all game, and thus practically deprive the Indians of their principal means of subsistence.

Race Horse, 163 U.S. at 518 (Brown, J., dissenting).

This Court has enforced pre-statehood treaties reserving Indian hunting, fishing and gathering rights in other cases, with no suggestion that the limitations they imposed on state authority to regulate wildlife impermissibly impaired the States' sovereign authority. *See, e.g., Dep't of Game v. Puyallup Tribe*, 414 U.S. 44, 48 (1973) (holding State prohibition on Indian net fishing violated treaty fishing right and remanding for apportionment of fishing opportunity between Indian and non-Indian fishermen). This Court has also affirmed the Federal Government's authority to reserve water (a critically important natural resource) for Indian lands, explicitly rejecting arguments that such reservations impair state sovereignty. *See Arizona v. California*, 373 U.S. 546, 597-98 (1963) (Congress' broad power to reserve water is not limited by the equal footing doctrine); *Winters v. United States*, 207 U.S. 564, 577 (1908) (rejecting equal footing argument and holding the "power of the [Federal] government to reserve the waters [in an agreement with an Indian tribe] and exempt them from appropriation under the state laws is not denied, and could not be").

This Court reached the same result in other contexts involving important state interests. As the *Mille Lacs* Court held:

> [T]here is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood. Treaty rights are not impliedly terminated upon statehood.

526 U.S. at 207 (emphasis in original) (*citing Wisconsin v. Hitchcock*, 201 U.S. 202, 213-14 (1906); *Johnson v. Gearlds*, 234 U.S. 422, 439-40 (1914)).

In *Wisconsin v. Hitchcock*, the State asserted that tribal members' treaty right to land "until they were required to surrender it by the President of the United States" was terminated by Wisconsin's admission to the Union. 201 U.S. at 213. In *Dick v. United States*, 208 U.S. 340, 352-53 (1908), the State contended that a tribe's right to the protection of federal liquor laws for 25 years under a pre-statehood agreement with the United States was terminated by Idaho's admission to the Union. And in *Johnson v. Gearlds*, the State maintained that a tribe's treaty right to the protection of federal liquor laws "until otherwise provided by Congress" was terminated by Minnesota's admission to the Union. 234 U.S. at 435. These cases certainly involved traditional and important state interests—interests in title to public lands and regulation of liquor—which are analogous to state interests in regulating wildlife. And *Dick* involved a right that, on its face, would terminate upon the happening of a "clearly contemplated" event—the passage of 25 years. *Cf.* Pet. App. 24 (Wyoming District Court's adoption of "clearly contemplated" event standard for implied termination at statehood). However, in each case, the Court firmly rejected the argument that these pre-statehood rights had been terminated by implication at statehood. Instead, applying ordinary principles of construction, the rights were deemed to terminate if and when the

stated condition was met. The same result should obtain here.

IV. THIS COURT'S CONSERVATION-NECESSITY DOCTRINE RECONCILES OFF-RESERVATION HUNTING, FISHING AND GATHERING RIGHTS WITH STATE INTERESTS AND CREATES INCENTIVES FOR TRIBES TO CONSERVE NATURAL RESOURCES IN CO-OPERATION WITH FEDERAL AND STATE AGENCIES.

A. The Conservation-Necessity Standard.

As discussed above (at 16), in *Tulee*, this Court held that a treaty securing the "right of taking fish" left the State "with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish." 315 U.S. at 684. The Court further developed this standard in later cases involving the same treaty right. For example, in *Puyallup Tribe v. Department of Game*, the Court held that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, *provided the regulation meets appropriate standards and does not discriminate against the Indians*." 391 U.S. 392, 398 (1968) (emphasis added). And in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, the Court held that "[a]lthough nontreaty fishermen might be subjected to any reasonable state fishing regulation

serving any legitimate purpose, *treaty fishermen are immune from all regulation save that required for conservation.*" 443 U.S. 658, 682 (1979) (emphasis added).

In *Antoine v. Washington*, the Court applied the conservation-necessity standard to an agreement securing the "right to hunt and fish in common with all other persons on lands not allotted to [the] Indians." 420 U.S. 194, 196 (1975). The Court held that *Puyallup*'s "appropriate standards" requirement "means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure *and* that its application to the Indians is necessary in the interest of conservation." 420 U.S. at 207 (citations omitted) (emphasis in original). The Court held that state regulation was inappropriate in that case because the State of Washington (like the State of Wyoming here) had not established "that applying the ban on out-of-season hunting of deer by the Indians on the land in question is in any way necessary or even useful for the conservation of deer." *Id.* Thus, as the United States has recognized in this matter, the conservation-necessity standard is a "demanding" one for the State to meet. U.S. Cert. *Amicus* Br. 21.

Nevertheless, as this Court explained in *Mille Lacs*:

> [The] "conservation necessity" standard accommodates both the State's interest in management of its natural resources and . . . federally guaranteed treaty rights. Thus, because treaty rights are reconcilable with state sovereignty over natural resources, statehood by itself is

> insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries.

526 U.S. at 205 (footnote omitted). For this reason as well, there is no basis on which to impute a countertextual intent to the parties to the Crow Treaty or to the Senate in ratifying the Treaty, in which the treaty hunting right would be extinguished at statehood even though the Treaty itself did not say so.

B. Tribal Regulation and Cooperative Management.

Under the conservation-necessity doctrine, states may not regulate the exercise of Indian usufructuary rights if the tribes adopt and enforce their own regulations, which are adequate to provide for conservation of the resources.[4] As a result, the doctrine creates a strong incentive for tribes to adopt and enforce their own regulations, typically in close cooperation with federal and state wildlife managers. The experience of the *amici* tribes in Michigan, Wisconsin and Minnesota illustrates that this has led to effective tribal

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[4] *E.g.*, *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784, 839 (D. Minn. 1994), *aff'd*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 668 F. Supp. 1233, 1241-42 (W.D. Wis. 1987); *United States v. Washington*, 384 F. Supp. 312, 340-42 (W.D. Wash. 1974), *substantially aff'd*, 520 F.2d 676 (9th Cir. 1975).

self-regulation and improved natural resources management for all concerned.

In these three states, Tribes, States and the Federal Government have developed and implemented model codes and entered into consent decrees and other agreements that promote consistent natural resources management and regulation. Notably, many of the agreements provide orderly dispute resolution processes that make judicial intervention in State-Tribal disputes the exception rather than the rule.

The midwestern tribes' treaty rights in Michigan, Minnesota and Wisconsin were extensively litigated during the 1970s, 1980s and 1990s. But out of the crucible of contentious litigation, the Tribes and States forged working relationships based on mutual respect for each other's authority and shared concern for conserving natural resources. A similar result is likely here.

1. Great Lakes Fishing Rights in Michigan.

In April 1973, the United States filed suit against the State of Michigan to protect the right to fish in the Great Lakes under an 1836 treaty with various Ottawa and Chippewa tribes. *United States v. Michigan*, 471 F. Supp. 192, 203 (W.D. Mich. 1979), *aff'd in part and modified in part*, 653 F.2d 277 (6th Cir. 1981). In the treaty, which paved the way for Michigan statehood in 1837, the Tribes ceded portions of the Great Lakes and millions of acres of land in Michigan's upper and lower peninsulas, while stipulating for "the right of hunting

on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement." *Id.* at 212-13. In 1979, the district court held that the Tribes retained the right to fish in portions of the Great Lakes ceded in the Treaty. *Id.* at 216. In 1985, after extensive negotiations conducted under the framework of the conservation-necessity doctrine, *see* 653 F.2d at 279, the parties reached an agreement regarding management and allocation of the Great Lakes fishery, which was adopted by the district court and remained in effect for 15 years. *United States v. Michigan*, 424 F.3d 438, 441 (6th Cir. 2005). A second Consent Decree negotiated by five tribes, the State of Michigan and the United States, was entered on August 7, 2000, and is effective through 2020. *Id.*[5]

To ensure conservation of the Great Lakes fisheries, the Tribes formed an inter-tribal organization (today known as the Chippewa Ottawa Resources Authority or CORA). Exercising authority delegated by the Tribes, CORA promulgated Great Lakes fishing regulations applicable to all of the Tribes, and assists in their enforcement.[6] Pursuant to the 2000 Decree, Federal, State and Tribal representatives meet regularly

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[5] Stipulation and Order (Consent Decree), *United States v. Michigan*, No. 2:73-CV-26 (W.D. Mich. Aug. 9, 2000), ECF No. 1458.

[6] Chippewa Ottawa Resource Authority, *Commercial, Subsistence and Recreational Fishing Regulations for the 1836 Treaty Ceded Waters of Lakes Superior, Huron, and Michigan* (rev'd April 3, 2017), *available at* http://www.1836cora.org/wp-content/uploads/2017/04/CORA-Regulations-Revised-April-3-2017.pdf.

to evaluate the condition of the resources and adjust harvest limits as appropriate.

2. Hunting, Fishing and Gathering Rights in Wisconsin.

In the late 1970s, the Lac Courte Oreilles Band of Lake Superior Chippewa sued the State of Wisconsin to confirm the continued existence of the Tribes' off-reservation hunting, fishing and gathering rights under 1837 and 1842 treaties with the United States. The Seventh Circuit held that those reserved rights continue to exist. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 365 (7th Cir. 1983), *appeal dismissed and cert. denied sub nom. Besadny v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 464 U.S. 805 (1983). Subsequent litigation regarding the scope and regulation of those rights occurred in the *Voigt* case throughout the 1980s.

At the same time, the Wisconsin Tribes created a Voigt Intertribal Task Force to negotiate with the State to implement the Tribes' reserved rights. Both the Tribes and the State came under intense pressure from non-Indian protesters who, fearing that tribal off-reservation fishing would harm the resource, sought to "portray[] the Indians as undeserving of the rights that they had preserved by treaty" and to "perpetuat[e] the idea that [the Indians] were lazy and wasteful and lacking in respect for conserving nature" to "justify the efforts to prevent tribal members from exercising those rights." *Lac du Flambeau Band of Lake Superior*

Chippewa Indians v. Stop Treaty Abuse-Wisconsin, 843 F. Supp. 1284, 1294 (W.D. Wis.), *aff'd*, 41 F.3d 1190 (7th Cir. 1994). Unfortunately, Wyoming's portrayal of Mr. Herrera's elk hunt in this case takes a similar approach. *See* Opp. Cert. at 7-8.

In Wisconsin, due to the efforts of the Voigt Intertribal Task Force, the Tribes and the State, the regulatory issues were largely resolved among the parties. In 1991, the district court entered a final judgment adopting a series of stipulations agreed to by the Tribes and Wisconsin to regulate tribal treaty rights on off-reservation ceded lands—a judgment that neither side appealed. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 775 F. Supp. 321, 324 (W.D. Wis. 1991). Those stipulations included a model conservation code conforming to the *Voigt* court orders and providing for "an orderly system for tribal control and regulation of hunting, fishing and gathering on the off-reservation lands ceded by the Tribe[s] in the [1837 and 1842 Treaties]." Voigt Model Off-Reservation Conservation Code § 1.03(1) (rev'd April 2018).[7]

The Voigt model code sets minimum standards for tribal regulation of off-reservation treaty rights through a robust enforcement scheme. *Id.*, ch.4 (enforcement). Each tribe that exercises 1837 and 1842 treaty rights in Wisconsin must enact a code no less restrictive than the model code as its own tribal

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[7] *Available at* www.glifwc.org/Regulations/VoigtModelCode.2018.internal.links.pdf.

conservation law. The codes are enforced by conservation officers employed by the Great Lakes Indian Fish and Wildlife Commission (GLIFWC)[8] and the State of Wisconsin. The State recognizes the authority of GLIFWC's officers and has enacted laws to support their efforts. *See, e.g.*, Wis. Stat. § 175.41.

The model code is not static; the Voigt Intertribal Task Force (now part of GLIFWC and consisting of members from eleven Michigan, Minnesota and Wisconsin Chippewa tribes) continues to oversee and continually assess tribal natural resources policy and biological information, set intertribal harvest quotas, and recommend changes to the model code.[9] Nor is the State shut out from the process; the *Voigt* stipulations remain in force and require the parties to make good faith efforts to communicate regarding their respective

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[8] GLIFWC comprises eleven Chippewa tribes in Michigan, Minnesota and Wisconsin and, among other things, coordinates regulatory activities across the tribes' shared 1837 and 1842 Treaty areas. *See* www.glifwc.org (last visited Aug. 29, 2018). GLIFWC biologists and resource specialists perform resource assessments and monitor and evaluate harvests, while GLIFWC conservation wardens help enforce tribal ceded territory conservation codes. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 707 F. Supp. 1034, 1050-51, 1054 (W.D. Wis. 1989); U.S. Dep't of the Interior, *Casting Light Upon the Waters: A Joint Fishery Assessment of the Wisconsin Ceded Territory* at 21 (1991).

[9] *Chippewa Intertribal Agreement Governing Resource Management and Regulation of Off-Reservation Treaty Rights in the Ceded Territory*, Section 5: Task Force Responsibilities (n.d.), *available at* https://www.glifwc.org/Recognition_Affirmation/Intertribal_CoManagement_Agreement.pdf.

regulations, and to review the stipulations and model code regularly.

In part due to effective tribal regulation of off-reservation rights, fears of irreparable harm to the resources did not come true. In 2009, the Wisconsin Legislature recognized the Tribes' and GLIFWC's "important role . . . in the preservation and protection of the natural resources of the ceded territory." 2009 Wis. Senate J. Res. 40 (June 30, 2009).[10] In 2013, a committee consisting of federal, state and tribal agencies concluded that the status of the off-reservation walleye fishery in Wisconsin had not changed significantly since 1991, when the committee concluded that the resource was healthy and tribal exercise of reserved fishing rights had not harmed the resource. U.S. Dep't of the Interior, *Fishery Status Update in the Wisconsin Treaty Ceded Waters* at 1, 20 (6th ed. 2013).[11]

In many instances, tribal, state and federal cooperation has produced demonstrable benefits for all concerned. For example, tribal, state and federal partners worked together for many years to restore wild rice in the 1837 and 1842 ceded territories in northern Wisconsin. As evidence of their success, between 2006 and 2013, nearly a quarter of all wild rice harvested off-reservation (by both Indian and non-Indian

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[10] *Available at* https://docs.legis.wisconsin.gov/2009/related/enrolled/sjr40.

[11] *Available at* https://www.glifwc.org/publications/pdf/FisheryStatus2013.pdf.

harvesters) has come from waters seeded through cooperative interagency restoration efforts.[12]

A similar effort has led to the restoration of elk in northern Wisconsin. In 1995, 25 elk were released into the Chequamegon National Forest near Clam Lake, Wisconsin, following a welcoming song and pipe ceremony by a Chippewa spiritual leader. The Wisconsin Department of Natural Resources, U.S. Forest Service, Chippewa tribes, and GLIFWC collaborated over the ensuing years to foster and enhance the elk population. Populations were monitored, augmented with elk from Kentucky and moved around the elk range to increase the size and genetic diversity of the population.[13] The herd has now grown to a level that will allow a hunting season this fall. The Wisconsin Elk Advisory Committee—comprised of State, GLIFWC and Tribal biologists—has agreed upon a quota to be divided among state and tribal hunters. Tribal regulations governing the hunt are being negotiated with Wisconsin pursuant to a regular stipulation review process that has been in place since 2011.

The Tribes and Wisconsin returned to court to adjudicate a *Voigt* dispute only once in the last 25 years. After the Seventh Circuit held that a prohibition on

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[12] GLIFWC, *Admin. Rep. 15-06, Manoomin (Wild Rice) Abundance and Harvest in Northern Wisconsin in 2013* (May 2015), *available at* https://data.glifwc.org/archive.bio/Administrative%20Report%2015-6.pdf.

[13] *Elk (omashkooz in Ojibwe) Returning to Ceded Territory*, Mazina'igan (GLIFWC, Odanah, WI), Fall 2017 at 12-13, *available at* http://www.glifwc.org/Mazinaigan/Fall2017/index.html?page=12.

night hunting in the 1991 decree could be re-opened, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 769 F.3d 543 (7th Cir. 2014), the parties focused on the "adequacy of [the tribes'] proposed regulatory scheme," which was approved by the district court with a minor modification. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, No. 74-cv-313-bbc, 2015 U.S. Dist. LEXIS 139294, at *4, 18-19 (W.D. Wis. Oct. 13, 2015).

3. Hunting, Fishing and Gathering Rights in Minnesota.

In 1990, the Mille Lacs Band sued Minnesota, alleging that the State had violated the Band's hunting, fishing and gathering rights under an 1837 Treaty (the same Treaty that had been at issue in the *Voigt* litigation). Six Wisconsin Ojibwe bands who were also successors to the 1837 Treaty later intervened and the case was consolidated with a parallel case brought by the Fond du Lac Band.

In September 1994, the district court held that the Bands' 1837 treaty rights continued to exist. *Mille Lacs*, 861 F. Supp. at 841. Thereafter, building on the stipulations and model code developed in the *Voigt* case, the Bands and Minnesota negotiated a series of protocols to coordinate harvest management and resource assessment in the Minnesota ceded territory, and the Bands developed a model Conservation Code, Commissioner's Orders and Management Plans to regulate their members' harvests. *Mille Lacs Band of*

Chippewa Indians v. Minnesota, 952 F. Supp. 1362, 1366-67 (D. Minn. 1997). The Bands, the State and the United States agreed that upon implementation of these measures the application of various state laws to the Bands would "not be necessary for conservation." *Id.* at 1367. In entering final judgment, district court ordered the State and the Bands to "fairly, uniformly and diligently enforce the conforming Band conservation codes," and to "work cooperatively" and "make good faith efforts" to coordinate enforcement activities. *Id.* at 1397. The parties to the *Mille Lacs* litigation have had no occasion to return to court since final judgment was entered (and ultimately affirmed by this Court) some 20 years ago.

4. Inland Hunting, Fishing and Gathering Rights in Michigan.

The resolution of tribal claims to inland hunting, fishing and gathering rights in Michigan under the 1836 Treaty provides a telling bookend to Midwest treaty rights litigation. When the State of Michigan initiated litigation asserting that those rights no longer existed, the parties were able to build on the working relationship they had developed through the 1985 and 2000 Great Lakes Consent Decrees, as well as the experiences of the Tribes and States in Wisconsin and Minnesota, to resolve all issues regarding the existence, scope and regulation of inland rights under the 1836 Treaty by agreement. *See* Mich. Dep't of Natural Resources (DNR), *2007 Inland Consent Decree FAQs* at

1.[14] The 2007 Inland Consent Decree provides for tribal regulation of Indian hunting, fishing and gathering subject to specific limitations in the Decree. *Id.* at 2-3. In negotiating the 2007 Decree, the State recognized that because (as in this case) "tribal hunting and fishing is for personal subsistence use and not commercial use[, it] has a limited effect on the resources in question." *Id.* at 2. According to Michigan's DNR:

> In the 1836 treaty-ceded territory, the DNR and the tribes coordinate research and assessment activities, restoration, reclamation, and enhancement projects, and regularly consult and exchange information with one another. These cooperative efforts and sharing of information have led to a high degree of transparency among the State and tribes. The Inland Consent Decree also defines harvest levels for various species, which ensures the availability of sufficient resources for tribal and non-tribal fishers and hunters in the future.

Id. By all measures, the 2007 Decree has worked well. There has been no dispute under the Decree that has led the parties to return to court since it was entered in 2007.

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[14] *Available at* https://www.michigan.gov/documents/dnr/2007_Inland_Consent_Decree_FAQs_9.28.17_604502_7.pdf (last visited Sept. 4, 2018) (discussing Consent Decree, *United States v. Michigan*, No. 2:73-CV-26 (W.D. Mich. Nov. 5, 2007), ECF No. 1799).

5. Gathering Rights within National Forests.

Not all co-management agreements result from litigation. In 1998, the GLIFWC member tribes and the Eastern Region of the United States Forest Service concluded a Memorandum of Understanding (MOU) that governs the Tribes' gathering rights on four National Forests within the 1836, 1837 and 1842 ceded territories. *See* MOU Regarding Tribal—USDA Forest Service Relations on National Forest Lands within the Ceded Territory in Treaties of 1836, 1837, and 1842 (March 2012).[15] The MOU implements treaty-guaranteed wild plant gathering rights under a model "off-reservation gathering code" and provides that tribal regulations can be no less restrictive than the model code without the Forest Service's consent. *Id.* at 11-12. The MOU also provides for collaboration between the Forest Service and the Tribes through knowledge exchanges and shared research, to promote ecosystem management that sustains and restores native plant communities. *Id.* at 6-7.

In sum, in the experience of *amici*, the conservation-necessity doctrine has created powerful incentives for Tribes to develop and enforce their own conservation regulations in close cooperation with States and the Federal Government. As Tribes have done so, States have moved from hostility to tribal treaty rights to

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[15] *Available at* https://www.fs.fed.us/spf/tribalrelations/documents/agreements/mou_amd2012wAppendixes.pdf. The National Forests covered by the MOU include the Chequamegon-Nicolet in Wisconsin, and the Hiawatha, Huron-Manistee and Ottawa in Michigan.

acceptance and recognition of tribal natural resources regulation—all to the benefit of the natural resources themselves. There is no reason to expect any different result here; either the Crow Tribe will adopt and enforce its own regulations to conserve natural resources (likely in cooperation with the State of Wyoming), or the State will retain the authority to regulate the exercise of the right upon making a proper showing under the conservation-necessity doctrine. Indeed, as noted in the Crow Tribe's amicus brief, the Tribe already enacted a Joint Resolution of the Tribe's legislative and executive branches and stands ready to work with Wyoming on this issue.

V. CONCLUSION

The Wyoming District Court misread the *Mille Lacs* decision to stand for the proposition that, as long as termination of a pre-statehood hunting right is tied to *some* "clearly contemplated" event, the right terminates at statehood. Pet. App. 24. To the contrary, as the *Mille Lacs* decision and the substantial body of precedent on which it relied makes clear, unless the "clearly contemplated" event itself is tied to statehood, there is no basis on which to imply that the Senate intended the treaty right to terminate upon statehood—as opposed to upon occurrence of the "clearly contemplated" event actually identified in the treaty. The implied addition of another unrelated condition violates all rules of construction, including the cardinal rule that the treaties cannot be re-written, expanded or contracted beyond their plain meaning. *See supra* Part I.

The contrary holding in *Race Horse* was based on a mistaken conception of state sovereignty over natural resources. As *Winans* and its progeny make clear, States share authority over natural resources with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, including the power to make treaties with Indian tribes. *See supra* Part II. There is, therefore, no basis on which to imply that the Senate did not intend an Indian treaty right to survive statehood simply because the treaty provided the right would terminate upon *some other* clearly contemplated event. As the *Mille Lacs* Court squarely held, "[t]reaty rights are not impliedly terminated upon statehood." 526 U.S. at 207.

The Wyoming District Court's clearly-contemplated-event standard is also inconsistent with this Court's conservation-necessity doctrine. As the *Mille Lacs* Court explained, that doctrine reconciled Indian treaty rights to harvest natural resources with the States' important interests in those resources. And, as the experience of the *amici* tribes makes clear, that doctrine has worked well in practice and fostered *improved protections* for and the *enhancement* of natural resources for the benefit Indians and non-Indians. *See supra* Part III.

Finally, absent a clear link to statehood, the Wyoming District Court's clearly-contemplated-event standard is no different than the "temporary and precarious" standard rejected in *Mille Lacs* because it is not "useful as a guide to whether treaty rights were intended to survive statehood." 526 U.S. at 207.

Accordingly, the judgment of the Wyoming District Court should be reversed.

Respectfully submitted,

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September 11, 2018

No. 17-532

In The
Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ Of Certiorari To The District Court Of Wyoming, Sheridan County

BRIEF FOR NATURAL RESOURCES LAW PROFESSORS AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are law professors who teach and write in the area of natural resources law. They file this brief to explain the development of the National Forest System in the United States. In particular, this brief provides a detailed analysis of the legislative history and circumstances surrounding the congressional acts and executive orders that led to the establishment of what is today the Bighorn National Forest.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), the U.S. Court of Appeals for the Tenth Circuit held that just twenty-two years after federal negotiators induced Crow leaders to cede the majority of their land base by solemnly promising that they would continue to possess "the right to hunt upon [such lands] as long as the game lasts," *Proceedings of the Great Peace Commission of 1867-1868*, at 86 (Vine Deloria Jr. & Raymond DeMallie eds., 1975) (hereinafter "*Great Peace Commission*"), this right disappeared.

[1] The parties have consented to the filing of amicus curiae briefs in this matter. No counsel for either party authored this brief in whole or in part, and no person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Amici file this brief as individuals and not on behalf of the institutions with which they are affiliated.

Repsis, 73 F.3d at 994. Even though game remains plentiful in the ceded territory, according to the Tenth Circuit, when Congress passed an act admitting Wyoming to the Union "on an equal footing with the original States," it abrogated Crow hunting rights. *Id.* at 989. Alternatively, the *Repsis* court stated that the creation of the Big Horn Forest Reserve[2] eliminated those rights. *Id.* at 993.

Lower court decisions in this case found *Repsis* controlling, and prevented Petitioner Clayvin Herrera from raising treaty rights as a defense when Wyoming prosecuted him for killing elk in the Bighorn National Forest. But *Repsis* is no longer good law. As the Petitioner and other amici have explained, this Court held in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), that a state's admission to the Union does not impliedly abrogate Indian treaty rights. *Id.* at 207. And there is no language in Wyoming's admission act, or discussion in the legislative history of

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[2] When President Grover Cleveland first set aside this area in 1897, it was referred to as the Big Horn Forest Reserve. Proclamation No. 30, 29 Stat. 909 (1897). In 1907, Congress passed legislation renaming all forest reserves "national forests," and thus, the Big Horn Forest Reserve became the Big Horn National Forest. *See* Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1256, 1269. Finally, President Theodore Roosevelt changed the name of this area to Bighorn National Forest in 1908. Exec. Order No. 908 (1908). Where possible, this brief refers to the area using the name it held during the time being referenced.

that act, which could be read to abrogate Crow treaty rights.[3]

This brief addresses the alternative argument raised in *Repsis* and below: that the creation of the Big Horn Forest Reserve eliminated Crow treaty hunting rights, either by abrogating those rights or effecting an occupation of the land in question. This Court has repeatedly held that while Indian treaties can be unilaterally abrogated by the United States, only Congress possesses such power, and Congress "must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202. Express statutory language is preferred. *United States v. Dion*, 476 U.S. 734, 739 (1986) (noting that an "[e]xplicit statement by Congress is preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights"). Where such language is absent there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the

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[3] Wyoming became a state in 1890. Act of July 10, 1890, ch. 664, 26 Stat. 222. A review of the legislative history of this Act establishes that Congress did not consider the abrogation of any Indian treaty rights when it admitted Wyoming to the Union. *See, e.g.*, H.R. Rep. No. 50-4053 (1889); S. Rep. No. 2695 (1889); 21 Cong. Rec. 2132-36, 2633-35, 2663-2712, 6468-94, 6515-32, 6570-89, 7034 (1890). Rather, the only references to Indian rights came during the discussion of an irrevocable commitment that Wyoming was required to adopt as a condition of statehood, providing that it would "forever disclaim" any rights to Indian lands. H.R. Rep. No. 39 at 4 (1890). This provision remains in the Wyoming Constitution. Wyo. Const. art. 21, § 26.

other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 740. No such evidence exists here.

The Tenth Circuit in *Repsis* incorrectly claimed that "in 1887, Congress created the Big Horn National Forest." *Repsis*, 73 F.3d at 993. In actuality, however, it was President Grover Cleveland – not Congress – who designated the Big Horn Forest Reserve, and he did so by proclamation in 1897. Proclamation No. 30, 29 Stat. 909 (1897). The law enabling President Cleveland to take this action was known as the General Revision Act of 1891 (also known as the Forest Reserve Act or the Creative Act), ch. 561, 26 Stat. 1095. Section 24 of that Act, which authorized the President to "set apart and reserve" "public land bearing forests . . . as public reservations," was added to the bill for the first time during a conference committee to reconcile competing House and Senate bills.

There was no language in the General Revision Act that abrogated tribal treaty hunting or fishing rights. To the contrary, the Act contains *anti*-abrogation language, stating that "nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands." § 10, 26 Stat. at 1099. An exhaustive review of the legislative history of not only this bill, but its predecessors, confirms that Indian usufructuary rights were never discussed when Congress considered the creation of forest reserves. *See* Section I(A)&(B), *infra* (collecting and discussing the legislative history).

Confusingly, the Tenth Circuit in *Repsis* went on to claim that because the designation of the Big Horn

Forest Reserve ensured that the lands "were no longer available for settlement" its "creation . . . resulted in the 'occupation' of the land." *Repsis*, 73 F.3d at 993. Since the 1868 Treaty of Fort Laramie limits Crow hunting rights to the "unoccupied lands of the United States," Treaty with the Crows, May 7, 1868, art. IV, 15 Stat. 649, such rights supposedly no longer existed.[4] It makes little sense, however, to read the designation of a forest reserve—an act designed to *prevent settlement* of the land—as an act of "occupation." President Cleveland's Proclamation explicitly reserved this land "from entry or settlement" and concluded by noting: "Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation." Proclamation No. 30, 29 Stat. at 909, 910.

Congress reviewed President Cleveland's designation of the Big Horn Forest Reserve almost immediately. In an 1897 appropriation act, which is today more commonly referred to as the Forest Service Organic Act, Congress suspended the effectiveness of the President's Proclamation for nine months to give settlers one more opportunity to occupy this land. Act of June 4, 1897, ch. 2, 30 Stat. 11, 34. After that period of time had passed, the land was once again withdrawn from settlement when the Big Horn Forest Reserve

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[4] Indian treaties must be interpreted according to special canons of construction, one of which requires the court to determine how the provisions would have been understood by the tribal negotiators. *Mille Lacs*, 526 U.S. at 196; *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

was automatically reinstated on March 1, 1898. Throughout this legislative process, Congress did not mention Crow treaty rights, let alone expressly abrogate them. *See* Section I(A)&(B), *infra* (collecting and discussing the legislative history).

This was not an oversight. Congress did not discuss abrogation of Indian treaty hunting rights when debating the 1891 and 1897 acts because the reservation of timbered lands from the public domain was not viewed as inconsistent with such rights. The forest reservation system was designed to ensure a governmental source of wood products to fulfill future needs and to mitigate the severity of droughts and flooding in the West. These purposes were not at odds with Indian hunting and fishing rights. *See* Section II, *infra*.

In fact, forest reserves have always been multi-use areas, and one of their uses has been to provide the public with the opportunity to hunt and fish for game species found within their borders. Sportsmen played an important role in the conservation movement that led to the creation of the National Forest System for this very reason. Today, National Forests remain areas where the habitat of game species is protected, in part, so that hunting and fishing can continue. Given this history, it is impossible to conclude that the creation of Big Horn National Forest abrogated Crow treaty hunting rights.

ARGUMENT

I. CROW TREATY RIGHTS WERE NEITHER ABROGATED NOR EXTINGUISHED BY THE CREATION OF THE BIG HORN FOREST RESERVE.

In the 1851 Treaty of Fort Laramie, the United States formally recognized Crow territorial boundaries, which included approximately 38.5 million acres of land in portions of what are now the states of Montana, Wyoming, North Dakota and South Dakota. *Montana v. United States*, 450 U.S. 544, 547-48 (1981). In that same treaty, the United States explicitly acknowledged that the Crow retained "the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." Treaty of Fort Laramie with Sioux, Sept. 17, 1851, art. V, 11 Stat. 749.

Less than twenty years later, federal officials sought a new treaty with the Crow Tribe. During negotiations, the Crow were repeatedly promised that if they ceded the land federal officials requested, they would "still be free to hunt as [they] are now." *Great Peace Commission* at 88, 90. Indeed, the Commissioner of Indian Affairs himself—Nathaniel Taylor—assured tribal leaders that they would have "the right to hunt upon [their ceded lands] as long as the game lasts." *Id.* at 86.

These negotiations culminated in the 1868 Treaty of Fort Laramie. Treaty with the Crows, May 7, 1868, 15 Stat. 649. That treaty established a reservation for the Crow Tribe of roughly eight million acres in

southern Montana. *Montana*, 450 U.S. at 548. While the Crow agreed to make this reservation their "permanent home" and to cede the remainder of their lands, the treaty expressly provided that the Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV, 15 Stat. 649. The creation of the Big Horn Forest Reserve did not abrogate or otherwise extinguish this treaty right.

A. The Big Horn Forest Reserve Was Created by the President with Authorization from Congress.

In 1891, Congress passed a statute commonly referred to as the General Revision Act (also known as the Creative Act, or the Forest Reserve Act), ch. 561, 26 Stat. 1095. At the time of its passage, the main purpose of the bill was to revise a series of land laws that had resulted in widespread frauds. *See, e.g.*, 21 Cong. Rec. 2351-52 (1890). To that end, the bill, which was the culmination of at least a decade of debate in Congress, revised or repealed provisions of the Preemption Acts,[5]

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[5] *E.g.*, Act of Sept. 4, 1841, ch. 16, § 10, 5 Stat. 453. Broadly speaking, the Preemption Acts provided a settler with the preferential right to buy his claim on the public lands for a small fee. Paul W. Gates, *History of Public Land Law Development* 219-47 (1968).

the Desert Land Laws,[6] and the Timber Culture Act of 1873.[7] Gates, *supra*, at 247, 565-66, 642 (broadly discussing modifications to land laws in the 1891 Act).

The House and Senate passed different versions of the bill that became the General Revision Act, and therefore, in September 1891, the bills were sent to a conference committee composed of Senators Plum (Kansas), Walthall (Mississippi), and Pettigrew (South Dakota), as well as Representatives Payson (Illinois), Pickler (South Dakota), and Holman (Indiana). 21 Cong. Rec. 10094, 10150, 10760 (1890). It was in conference that a new provision was added[8] which would

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[6] *E.g.*, Act of Mar. 3, 1877, ch. 107, 19 Stat. 377. In the Desert Land Laws, Congress authorized individuals in dry regions to file plans for irrigating up to 640 acres of nontimbered, nonmineral land, and to enter such lands upon payment of a small fee. If the individual could offer proof within three years that he had reclaimed the land for irrigation, he could receive title to the lands. Gates, *supra*, at 401, 638-42; E. Louise Peffer, *The Closing of the Public Domain: Disposal and Reservation Policies 1900-50*, 14 (1972); *see also* Gifford Pinchot, *Breaking New Ground* 81-82 (1947) (describing creative fraud schemes).

[7] Act of Mar. 3, 1873, ch. 276, 17 Stat. 605. This Act allowed settlers to claim 160-acres of land if they agreed to plant 40 acres (later amended to 10 acres) in trees and cultivate them. Ten years after entry, settlers were required to submit final proof of their tree cultivation to receive title to the land. John Ise, *The United States Forest Policy* 43-45 (1920).

[8] There is no official record of the actions that occurred during conference committee. Many scholars have expressed the view that Secretary of the Interior John Noble intervened at the "eleventh hour" and requested the insertion of Section 24 in the General Revision Act during the conference committee, after explaining that President Harrison would veto the law if it failed to include such a provision. *See, e.g.*, Ise, *supra*, at 115 n.187 (1972);

become the basis of what is today our system of National Forests:

> Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of reservations and the limits thereof.

General Revision Act, § 24, 26 Stat. at 1103. The bill, with Section 24 included, was then unanimously agreed to by the conferees.

Following the conference committee's agreement, the bill was then presented to Congress. Just a few days before the close of the session, on February 28, 1891, the Senate agreed to the committee's changes, including the addition of Section 24 regarding the establishment of forest reserves. Senator Plumb of Kansas, who had control of the bill, insisted on its

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Harold K. Steen, *The U.S. Forest Service: A History* 26 n.13, 26-27 (1976); Pinchot, *supra*, at 85. But the doctoral dissertation of Herbert Kirkland uncovered additional archival sources showing that Secretary Noble was not aware that Section 24 had been included in the bill for more than two weeks after its passage. Herbert D. Kirkland, The American Forests, 1864-1898: A Trend Toward Conservation 175 (1971) (unpublished Ph.D. dissertation, University of Florida). The provision was probably introduced by Senator Holman from Indiana; Holman had introduced a prior bill with very similar language, and he was a member of the General Revision Act's conference committee in 1891.

speedy consideration. There was some resistance from Senator Call who stated, in response to the reading of Section 24, "I shall not willingly vote . . . to any proposition which prevents a single acre of the public domain from being set apart and reserved for homes for the people of the United States who shall live upon and cultivate them." But despite Call's objections, the conference report was agreed to by the Senate. 22 Cong. Rec. 3545-47, 3605 (1891).

The bill encountered greater opposition in the House, however. Representative Payson attempted to obtain unanimous consent to the conference report without printing the bill, but he was vigorously challenged on this point by Representative Dunnell of Minnesota. 22 Cong. Rec. 3613-16 (1891). Substantively, Representative McRae of Arkansas voiced his opposition to the addition of Section 24. McRae pointed out that "[t]here is no limitation upon this extraordinary power if the land be covered with timber," and he argued that no lands should be withdrawn if they "are fit for agricultural purposes and not required for military purposes." *Id.* at 3614. Representative Payson responded by noting that "the right of a private citizen to make a home upon the public domain ought as a matter of public policy to be subordinated to the larger and broader principle of conserving the general good." *Id.*

Ultimately, Payson was able to carry the measure safely through the discussion on February 28, 1891. He

reminded his fellow legislators that "[t]here has never been an hour during the last ten years when the principle [sic] propositions in this bill have not been the subject of active and earnest discussion in this House." 22 Cong. Rec. 3615 (1891). This was true even for Section 24, and Representative Holman pointed out "that the bill in regard to the withdrawal of forest land is exactly the same as the bill passed last session, after very careful consideration," but which had failed in the Senate. *Id.* at 3614.[9]

While Payson could not obtain unanimous consent to the bill's passage on February 28, the bill was considered again on Monday, March 2, 1891, after the bill and conference report were printed. *Id.* at 3616. It passed without further debate, and the President was thus authorized to "set apart and reserve" public lands as forest reservations. 22 Cong. Rec. 3658, 3685-86 (1891). Within two years, Presidents William Harrison and Grover Cleveland had set aside more than eighteen million acres of land as forest reserves.

By the fall of 1893, however, it had become apparent that the continued creation of forest reserves was ineffective to safeguard these lands unless Congress

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[9] Representative Holman was likely referring to a bill that he had introduced in 1888, titled "A bill to secure to actual settlers the public lands adapted to agriculture, to protect the forests on the public domain, and for other purposes." H.R. 7901, 50th Cong. (1888). At the time, Holman was chairman of the Public Lands Committee. According to Gifford Pinchot, the American Forestry Association presented this bill to Holman, and it was originally drafted by Dr. Fernow, then head of the Forestry Division. Pinchot, *supra*, at 84.

also passed legislation providing direction for their protection and management. Peffer, *supra*, at 16, 17 n.26. Thus, in 1896, a National Forest Commission was created and provided $25,000 in funding by Congress "to enable the Secretary of the Interior to meet the expenses of an investigation of a national forestry policy for the forested lands of the United States." Act of June 11, 1896, ch. 420, 29 Stat. 413, 432.

The Secretary of the Interior directed Professor Wolcott Gibbs, President of the National Academy of Sciences, to assemble such a commission. The Commission traveled throughout the West, touring existing forest reserves and investigating areas where new reserves might be designated. Message from the President of the United States Transmitting the Report of the Committee Appointed by the Academy of Sciences Upon the Inauguration of a Forest Policy for the Forested Lands of the United States, Senate, 55th Cong., 1st Sess. Doc. No. 105, at 7 (hereinafter "Commission Report"); Pinchot, *supra*, at 89-93. On February 1, 1897, Charles Sargent, Chairman of the National Forest Commission, sent a preliminary report to Gibbs. In that report, the Commission recommended the immediate establishment of thirteen new forest reserves, including the Big Horn Forest Reserve. Commission Report at 39-40; *see also* Pinchot, *supra*, at 105-09 (noting that the Commission unanimously voted to recommend the creation of these new reserves in October 1896, and that Pinchot drafted descriptions for each of these reserves which were included by Sargent in his recommendations).

The Commission's preliminary report was forwarded by Gibbs to the Secretary of the Interior. Commission Report at 39 (attaching letter from Wolcott Gibbs to Hon. David Francis, Secretary of the Interior (Feb. 1, 1897)). After reviewing the recommendations, Secretary Francis wrote President Cleveland on February 6, 1897 suggesting that he follow the report's recommendations and establish thirteen additional forest reservations totaling an area of more than twenty-one million acres, including the Big Horn Forest Reserve. He concluded his letter by "respectfully suggest[ing] that the one hundred and sixty-fifth anniversary (February 22, 1897) of the birth of the Father of our Country could be no more appropriately commemorated than by the promulgation by yourself of proclamations establishing these grand forest reservations." *Id.*

Acting on this suggestion, on February 22, 1897, President Cleveland proclaimed thirteen new forest reserves in the West. Known as "Washington's Birthday Reserves," they included the Big Horn Forest Reserve in Wyoming. Pinchot, *supra*, 107-08. In the Proclamation establishing the Big Horn Forest Reserve, the President noted simply that these "public lands in the State of Wyoming, within the limits hereinafter described, are in part covered with timber, and it appears that the public good would be promoted by setting apart and reserving said lands as a public reservation." 29 Stat. at 909. In the operative section, the Proclamation states that the lands are "hereby reserved from entry or settlement and set apart as a Public Reservation." *Id.* It concludes: "Warning is hereby

expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation." *Id.* at 910.

Cleveland made these proclamations without laying any of the political groundwork. Douglas Brinkley, *The Wilderness Warrior: Theodore Roosevelt and the Crusade for America* 293 (2009) (noting that "[w]hat added to these [western] senators' fury was that President Cleveland had issued his order without consulting them in any way"). The furor of opposition to these forest reserves from western states was unprecedented, even while eastern states continued to support their withdrawal from the public domain. Ise, *supra*, at 133-36. In the yearly bill to fund governmental operations—what would become the Sundry Civil Appropriations Act of 1897, but is more commonly referred to today as the Forest Service Organic Act—a compromise was reached. Peffer, *supra*, at 17-18; Pinchot, *supra*, at 109-12.[10] The bill "suspended" "Washington's Birthday Reserves" for nine months. Act of June 4, 1897, ch. 2, 30 Stat. 11, 34. This suspension was a clever tactic to overcome western demands for totally eliminating the new forest reserves. During this nine-month period, settlers could enter land in these areas, cut timber, and perfect claims that would be recognized by the federal government. After the nine-month

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[10] The first compromise bill was vetoed by President Cleveland. Senator Richard Pettigrew from South Dakota was able to craft a new compromise that passed Congress and was signed into law by President McKinley in June 1897. Pinchot, *supra*, at 112-16; Ise, *supra*, at 130-42.

period expired, however, each of the thirteen forest reserves, including the Big Horn forest, was to revert by default to their prior status unless the President took additional action. *Id.* at 34. To that end, the Act reaffirmed the President's authority to proclaim forest reserves, and it granted the President new authority to modify and withdraw those designations. *Id.* at 35.

President McKinley succeeded Cleveland, and he did not withdraw the proclamation for the Big Horn Forest Reserve. Thus, in March 1898, the Big Horn reserve was reinstated, reverting to the same status as if it had never been "suspended." Since that time, the forest's boundaries have been adjusted on several occasions by different presidents. *See, e.g.*, Proclamation No. 14, 31 Stat. 1976 (1900) (President William McKinley enlarging Big Horn forest); Proclamation No. 21, 32 Stat. 2004 (1902) (President Theodore Roosevelt enlarging Big Horn forest); Proclamation No. 39, 33 Stat. 2384 (1904) (President Theodore Roosevelt enlarging and diminishing area of Big Horn forest). Each of these proclamations contains the same general language found in the original designation of the Big Horn Forest Reserve, noting that reserving the land would promote "the public good," and warning settlers not to make settlement upon the reserved lands.

B. Congress Did Not Abrogate Crow Treaty Rights When It Passed the 1891 General Revision Act or the 1897 Forest Service Organic Act.

While Congress can unilaterally abrogate Indian treaty rights, its intention to do so must be clear and plain, because "Indian treaty rights are too fundamental to be easily cast aside." *Dion*, 476 U.S. at 738-39. Not only do Indian treaties represent solemn obligations of the federal government, but they also confer property rights which, when abrogated, require the payment of just compensation. *United States v. Sioux Nation*, 448 U.S. 371, 408-09 (1980) (concluding that just compensation is due when Indian property rights are taken unless Congress has made a good faith effort to provide the property's full value). For these reasons, this Court has been extremely reluctant to find congressional abrogation of treaty rights absent explicit statutory language. *Washington v. Wash. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979); *see also Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968) (holding that statutes will not be read to abrogate Indian treaty rights in "a backhanded way"). If explicit language does not exist, abrogation will be found only if congressional intent can be determined from "clear and reliable evidence in the legislative history of a statute." *Dion*, 476 U.S. at 739. "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the

other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 739-40.

There is no such evidence here. The General Revision Act of 1891 actually disclaims any impact on Indian property rights. § 10, 26 Stat. at 1099 (stating "[t]hat nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes"). And not only is there nothing in the text of the Act that indicates an intent by Congress to abrogate Indian treaty rights, let alone the hunting rights of the Crow Tribe, but nothing in the legislative history of the Act does so, either. Tribal hunting and fishing rights are not specifically mentioned in any of the congressional debates. *See* 21 Cong. Rec. 1523, 2349-53, 5272, 10085-94, 10760 (1890); 22 Cong. Rec. 3545-47, 3605, 3613-16, 3658, 3685-86.

Congress did consider other Indian interests in the debates on the bill. For example, beyond the anti-abrogation language in Section 10, the Senate discussed the need to ensure that neither Indians nor whites deliberately set fire to timber on the public domain. 21 Cong. Rec. 10091 (1890). The Senate also discussed setting apart the Annette Islands as a reservation for the Metlakahtlan Indians. 21 Cong. Rec. 10092-93. Yet there was no discussion of hunting or fishing rights in general, or the Crow Tribe's treaty rights in particular. *Swim v. Bergland*, 696 F.2d 712,

717 (9th Cir. 1983) (rejecting any claim that the Forest Reserve Act "gave [the President] the power to extinguish Indian treaty rights in those [federal] lands").

The same is true for the 1897 Forest Service Organic Act. That Act, among other things, suspended the effectiveness of President Cleveland's designation of the Big Horn Forest Reserve for nine months; granted the president authority to modify and revoke forest reserves previously created; and provided for the reinstatement of the Big Horn forest back into the forest reserve system, where it remains today. 30 Stat. at 34-35. Nothing in the legislative history of that statute indicates that Congress considered tribal treaty rights to hunt, fish, and gather in forest reserves in general, or in the Big Horn Forest Reserve in particular. *E.g.*, 30 Cong. Rec. 899-902, 905, 908-25, 961-71, 1278-85 (1897).

These statutes—the 1891 General Revision Act and the 1897 Forest Service Organic Act—form the basis of the National Forest System and, for that reason, they have been studied extensively by natural resources scholars. Scholars have recounted the history of prior bills, as well as petitions and reports submitted to Congress beginning in the 1870s, which would have granted the President the authority to withdraw forested lands from the public domain. *See, e.g.*, Kirkland, *supra*, at 140-55; Joseph Arthur Miller, Congress and the Origins of Conservation: Natural Resource Policies, 1865-1900, at 201-46 (July 1973) (unpublished Ph.D. dissertation, University of Minnesota); James L. Huffman, *A History of Forest Policy in the United*

States, 8 Envtl. L. 239, 240-58 (1978); Ise, *supra* at 45, 110-14. None of the predecessor bills contained language that would have abrogated Indian treaty hunting, fishing and gathering rights. *See, e.g.*, Kirkland, *supra*. These same scholars have analyzed the official and private correspondence of the key legislative and executive branch officials involved in the passage of the 1891 and 1897 Acts. *E.g.*, *id.* at 170-87 (reviewing archival collections including Bernard Fernow's papers at the National Archives, Gifford Pinchot's papers at the Library of Congress, and George Bird Grinnell's papers at the University of North Carolina, Chapel Hill). While such sources are well outside the legislative history and cannot be used to provide clear and plain congressional intent, even they do not appear to contain *any* indication that any official considered Indian treaty hunting rights and believed that the Acts would abrogate such rights. *Id.*

Lastly, the President cannot abrogate Indian treaties; only Congress has this power. But regardless, there is no indication in any of the official documentation that discussed setting aside the Big Horn Forest Reserve that anyone considered hunting and fishing rights, let alone wanted to abrogate those rights. For example, the February 1, 1897 letter from Charles Sargent on behalf of the National Forest Commission, which requested the designation of thirteen new forest reserves—including the Big Horn Forest Reserve—contains no mention of the Crow Tribe's hunting rights in the area. *See* Commission Report at 39-44 (attaching letter). With respect to the Flat Head Forest Reserve,

however, Sargent does mention that the Blackfoot Indians use water from the Milk River, and that the designation of this area as a national forest will help protect this waterway. *Id.* at 40. For two other proposed forest reserves—the San Jacinto Forest Reserve and the Utah Forest Reserve—Sargent's letter notes that some of the land had already been set aside as Indian reservation lands, and such lands would either need to be carved out of the designation or purchased by the United States. *Id.* at 43. Thus, it appears that where tribal rights could be impacted by the designation of a forest reserve, those rights were mentioned in Sargent's correspondence. But since hunting was not inconsistent with the designation of the Big Horn Forest Reserve, Crow treaty rights were not discussed.

II. TREATY HUNTING RIGHTS DO NOT CONFLICT WITH NATIONAL FOREST MANAGEMENT.

In recent years, scholars have finally acknowledged the significant role that sportsmen played in the conservation movement which led to the creation of the National Forest System. *See generally* John F. Reiger, *American Sportsmen and the Origins of Conservation* (3d ed. 2001). Sportsmen pushed for the protection of these areas to ensure the vitality of game species as well as their continued access to such species. *Id.* at 106 (noting that sportsmen "saw forests not as a challenge to the American mission of progress, but as one of the essential settings for that important activity called sport," because "[w]oodlands were both the

home of their quarry and the aesthetic backdrop for that avocation that many considered more rewarding—in a noneconomic sense—than their vocation"); *see also id.* at 124 (noting that sportsmen led the push for creation of forest reserves because they "wanted the preservation of their game and sporting grounds for aesthetic and recreational reasons, but they knew that the best way to accomplish their purpose was to couch it in utilitarian terms"). Thus, it is not surprising that hunting and fishing by members of the public has never conflicted with the purposes for which national forests were created. They were created to ensure a steady supply of timber and to protect waterways. From their inception, national forests were areas to be *used* rather than simply *preserved*. Their multi-use mandate has always included wildlife management in general, and hunting and fishing activities in particular.

Treaty rights retained by Indian tribes are in accord with this multi-use mandate. Tribal members are simply using national forests to harvest available resources that they are legally entitled to use. In doing so, they must comply with tribal hunting and fishing regulations, which are designed to ensure that there are healthy, sustainable fish and game populations for future generations. In actuality, tribal members tend to take only a small percentage of the available large game animals. *See, e.g.*, Miles Falck, Great Lakes Indian Fish & Wildlife Commission, *Results of the 2016 Off-Reservation* Waawaashkeshi *(deer)*, Makwa *(bear) and* Omashkooz *(elk) Harvest in the 1836, 1837 and*

1842 Ceded Territories of Michigan, Minnesota and Wisconsin at 7 (May 2018), https://data.glifwc.org/archive.bio/Admin%20Report%2018-04.pdf (noting that in 2016, tribal members took just 1,470 deer across twenty-three Wisconsin counties while exercising their off-reservation hunting rights under 1837 and 1842 treaties). This Court has recognized that states may regulate tribal treaty rights if they can demonstrate it is necessary for the conservation of the species. *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 (1968). No such conservation necessity exists here; elk populations in Bighorn National Forest are actually higher than the desired management goal.

A. Key Players in the Early National Forest Movement Acted to Preserve Access to Game Animals on Public Lands.

In the 1870s and 1880s, Americans were just beginning to face the fact that wildlife resources were exhaustible. By this time, most of the eastern United States was deforested. Meanwhile, in the Midwest and western United States, wasteful destruction of wildlife was bringing species to the brink of extinction.[11]

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[11] The passenger pigeon, for example, was once found in the billions; dense flocks passing overhead could cause darkness to descend on an area for several minutes. Yet by the late 1880s, it had already become scarce. Allan Eckert, *The Silent Sky: The Incredible Extinction of the Passenger Pigeon* (2000). Other species of birds were imperiled by the insatiable demand created for bird feathers used to create fashionable hats worn by women in the United States. *American Sportsmen*, *supra*, at 95. Large game species such as the bison, which had historically numbered in the

Without government intervention to ensure sustainable wildlife populations and to protect their habitat, hunting might have become an activity limited to the landed estates of the wealthy, as it was in England. *See, e.g.*, Thomas A. Lund, *British Wildlife Law Before the American Revolution: Lessons From the Past*, 74 Mich. L. Rev. 49, 60 (1980) (discussing the reasons why in England, "game became [the] exclusive provender for the rich").

Perhaps not coincidentally, it was during this same time period in the 1870s and 1880s that the first national sporting periodicals appeared: *American Sportsman, Forest and Stream, Field and Stream*, and *American Angler*. These periodicals provided an important vehicle for encouraging the government to protect forested areas necessary to preserve fish and game. John F. Reiger, *Wildlife, Conservation, and the First Forest Reserve*, in *Origins of the National Forests: A Centennial Symposium* 106 (1992) (hereinafter *Origins*). A look at just one of these publications—*Forest and Stream*—shows how influential hunting and fishing sportsmen were in the conservation movement in general, and the push for forest reserves in particular.

Charles Hallock, the editor of *Forest and Stream*, used a subtitle every week to announce that his paper

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millions, also seemed destined for extinction by the 1880s. *Id.* at 94-95.

was "Devoted to . . . Preservation of Forests." *American Sportsmen, supra,* at 111. He frequently ran editorials emphasizing the need to protect forests as habitat for the game animals therein. *Id.* For example, an 1882 editorial entitled "Spare the Trees," asked:

> [W]hat will [fish and game codes] avail if there is no cover for game nor water for fish? . . . The crop [from a well-managed forest] . . . breaks the fierceness of the winds and keeps the springs from drying up, and is a comfort to the eye. . . . Under its protecting arms live and breed the grouse, the quail and the hare, and in its shadowed rills swim the trout. If we would have these, we must keep the woods a-growing. No woods, no game; no woods, no water; and no water, no fish.

Id. at 105 (quoting "Spare the Trees," in *Forest and Stream*, Apr. 13, 1882).

George Grinnell was the author of this and many other editorials. He joined the staff of *Forest and Stream* in 1876, after having already founded the Audubon Society. Reiger, *Origins, supra*, at 107. In the 1880s, when he became friends with Theodore Roosevelt, he mentioned the need for a sportsmen society to advocate for larger game mammals in the same way that the Audubon Society was advocating for birds. Roosevelt agreed, and the Boone and Crockett Club was born. At first, the club's members were primarily New York capitalists with deep pockets, as Roosevelt realized that large sums of money would be necessary to effectively lobby Congress. Brinkley, *supra*, at

202-03. Over time, however, the club would include many of the most respected men in America, as well as many of the leading figures in forest conservation, such as Gifford Pinchot.[12] Reiger, *Origins*, *supra*, at 111. As John Reiger notes "the members of the Boone and Crockett Club were central to the establishment of the first forest reserves. And the goal of conserving wildlife, especially big game, proved to be at least as important an objective as watershed protection." *Id.* at 116.

It was the Boone and Crockett Club that worked to convince President Harrison to designate the first forest reserve established in 1891, the Yellowstone National Park Timberland Reserve, which "in essence," became "the birthplace for both the national parks and national forests." *American Sportsmen*, *supra*, at 165-66; Reiger, *Origins*, *supra*, at 116.[13] After this

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[12] Pinchot was a big-game hunter and an ardent angler. *American Sportsmen*, *supra*, at 70. In 1896, he travelled west with the National Forest Commission to view the forest reserves already proclaimed by Presidents Harrison and Cleveland and to recommend additional reserves, including the Big Horn Forest Reserve. In his book *Breaking New Ground*, Pinchot describes a multi-week trip he took to hunt and fish in forested areas in Montana (including what would become the Flathead Forest Reserve and the Lewis and Clark Forest Reserve) immediately prior to the Commission's formal trip. Pinchot, *supra*, at 97-100. On that trip, Pinchot describes hunting for bighorn ram, grizzly bears, and deer, as well as trout fishing. *Id.* at 98, 99, 101, 102; *see also id.* at 125, 128-29 (describing subsequent hunting trip to western forest reserves in the summer of 1897).

[13] Harrison may have been easy to convince since he himself "had a penchant for duck hunting that knew no bounds." *American Sportsmen*, *supra*, at 108; *see also id.* at 236-37

successful interaction, Grinnell remained in constant contact with President Harrison's Secretary of the Interior, John W. Noble, about Indian issues (of which Grinnell "was also a dedicated champion"), forest protection, and fish and game. *Origins* at 116.

Secretary Noble's 1891 Report to Congress demonstrates the influence of the Boone and Crockett Club on his thinking. He noted in that Report that in addition to preventing "the needless destruction of our great forest," forest reserves "will preserve the fauna, fish and flora of our country, and become resorts for the people seeking instruction and recreation." *Interior Annual Report* (1891), I: XV. Wildlife figured significantly in President Harrison's creation of many early forest reserves. For example, petitions for the White River Plateau, Pike's Peak, and Pecos Forest Reserves called attention to the wildlife resources found therein as justification for their withdrawal from the public domain. *See* James Muhn, *Early Administration of the Forest Reserve Act: Interior Department and General Land Office Policies, 1891-1897*, 261, *in Origins, supra* (citing correspondence found in Record Group 49 of the National Archives).

President Harrison proclaimed forest reserves totaling some thirteen million acres during his time in office. He was succeeded by Grover Cleveland who like Harrison, was an "eminent sportsm[a]n." *American*

(reprinting pictures of President Harrison hunting at the Bengies Ducking Club in March 1891, the same month that the General Revision Act was passed).

Sportsmen at 108. While serving as President, Cleveland's love of bird hunting and freshwater fishing were so well known that he received "an unrelenting cascade of rods, flies, sinkers, hooks and lines" as well as "guns, cartridges, belts, game baskets, duck decoys, and stool pigeons," all from members of the public. H. Paul Jeffers, *An Honest President: The Life and Presidencies of Grover Cleveland* 226-27 (2000). In 1906, long after he finished his second term as President, Cleveland wrote a book on the joys of hunting and fishing called *Fishing and Shooting Sketches*. *Id.* at 82; *see also American Sportsmen, supra*, at 64, 108, 229.

President Cleveland was succeeded by Theodore Roosevelt, whose love of hunting is well known. Roosevelt set aside a total of 148 million acres of forest lands. He was supported in his efforts by Gifford Pinchot, who counseled him to continue couching these designations as necessary for timber consumption and watershed protection. But in private letters to President Roosevelt, Pinchot was more candid, and explained that nothing should be done to arouse public opposition to the extension of the forest-reserve system, "which is the prime necessity for the preservation alike of forests, streams, *and game*." *American Sportsmen*, *supra*, at 71. (emphasis added).

All of the key federal officials involved in the early decisions to create forest reserves expressed their intention to have these lands used not only for timber production and watershed protection, but also as areas of wildlife habitat where hunting and fishing could occur for future generations. Presidents Benjamin

Harrison, Grover Cleveland, and Theodore Roosevelt were all avid sportsmen, and their personal love of hunting and fishing was no doubt a contributing factor in their decisions to designate millions of acres of national forest land, including Bighorn National Forest. *American Sportsmen* at 62 (listing Presidents Harrison, Cleveland, and Roosevelt among seventy-six names of key sportsmen who shaped the early conservation movement, including the development of the National Forest System).

B. National Forests Are Multi-Use Areas That Have Always Permitted Hunting and Fishing.

In its 1897 Report, the National Forest Commission noted that reserved lands "must be made to perform their part in the economy of the nation" and "be managed for the benefit of the people of the whole country." Commission Report at 22-23. Thus, from their very beginning, national forests were created as multi-use areas. *See* Forest Commission's Report at 35-36 (contrasting areas where "natural wonders should be preserved without further defacement," and where "mining is prohibited . . . [or] their scenic value will be seriously impaired," with forest reserves, which were to be used for timber production, mining, and other consumptive uses). Multiple-use management is the basis of the oft-repeated Forest Service motto, which is to "manage these preserves for the greatest good to the greatest number in the long run."

One of these uses has always been hunting and fishing. The Organic Act's language limited the purposes for which national forests could be *established* to the protection of the forest, securing favorable waterflows, and furnishing a supply of timber. *See United States v. New Mexico*, 438 U.S. 696, 707-08 (1978). But the Act did not limit the purposes for which forests could be *managed*. Early on, these areas were managed for their fish and game resources. The public was permitted to use those resources by hunting and fishing therein unless the President directed otherwise.

In a 1907 Act, for example, Congress explicitly acknowledged that National Forests were used for their game resources by appropriating money for "the protection of fish and game" and "to transport and care for fish and game supplied to stock the national forests or the waters therein." Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1256, 1269-70; *see also* Eric T. Freyfogle & Dale D. Goble, *Wildlife Law: A Primer* 223 (2009) ("By the 1920s, the Forest Service was affirmatively managing its lands for wildlife-related recreation, particularly hunting"). In the 1930's, the Forest Service began issuing hunting and fishing regulations that identified hunting seasons, adopted bag and creel limits, and established licensing fees. *E.g.*, Regulation G-20-A, 1 Fed. Reg. 1259, 1266 (Aug. 15, 1936). Indeed, hunting had become so commonplace in national forests that when it decreased during World War II, "there was a distinct increase in the numbers of big game," which was significant enough to cause conflicts with livestock that

was competing for the forage within national forests. Peffer, *supra*, at 283.

In 1960, Congress officially recognized the multi-use mandate of national forests through the Multiple-Use, Sustained-Yield Act ("MUSYA"), Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified at 16 U.S.C. §§ 528-31). That Act provides that national forests, including Big Horn National Forest, "shall be administered for outdoor recreation, range, timber, watershed, and *wildlife and fish purposes*." 16 U.S.C. § 528 (emphasis added). The House Report for MUSYA noted that there was no opposition to this bill because "[t]he administration of the national forests has long been under the policies of multiple use." H.R. Rep. No. 86-1551, at 2 (1960). Congress simply thought it should clarify this practice through the enactment of a single statute that named "all [of] the renewable surface resources for which the national forests are established and shall be administered." *Id.*

In hearings leading to the passage of MUSYA, commentators frequently noted the extensive use that members of the public made of national forests for hunting and fishing purposes. *National Forests—Multiple Use and Sustained Yield: Hearing on H.R. 10572 Before the Subcomm. on Forests of the H. Comm. on Agriculture*, 86th Cong. 13, 18, 20, 21, 28, 35, 63, 100, 104, 109, 113, 115, 129 (1960). Acting Secretary of the Interior E.L. Peterson confirmed in a letter supporting the bill that one of the very reasons national forests were established was because they yield "game, and other wildlife," and he reminded Congress that "[o]ne-third

of the Nation's big game is found within their boundaries." *Id.* at 5. Other commentators provided detailed figures for particular national forests. For example, one letter included in the hearing record indicated that in 1959, the Monongahela National Forest welcomed 344,600 people who used its streams and lakes to fish, while hunting drew another 179,170 visits. *Id.* at 116.

Recognizing that national forests were facing increased demands for hunting and fishing opportunities, in 1974 Congress passed a statute known as the Sikes Extension Act, Pub. L. No. 93-454, 88 Stat. 1369 (1974) (codified as amended at 16 U.S.C. §§ 670a *et seq.*). In that Act, Congress instructed the Forest Service to create comprehensive plans for wildlife management in cooperation with state agencies.[14] *Id.* at § 201(a), 88 Stat. at 1369. These plans were to be designed to "enhance wildlife, fish and game resources to the maximum extent practicable," thereby providing more opportunities for members of the public to engage in hunting and fishing activities within national forests. *Id.* at § 205(6), 88 Stat. at 1374.

Today, hunting continues to be permitted in national forests. Beginning in 1941, the Forest Service

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[14] The federal government has almost unlimited power to manage the lands it owns, and therefore could enact its own laws governing all aspects of hunting and fishing, leaving no role for state laws. *Kleppe v. New Mexico*, 426 U.S. 529 (1976). But it has not done so. Hunting and fishing on federal lands must comply with state licensing requirements, game seasons, and bag limits unless, for example, they are conducted pursuant to federally protected treaty rights. Freyfogle & Goble, *supra*, 206-07.

decided that rather than continue to issue and enforce its own hunting and fishing regulations, it would enter into cooperative agreements with states providing that state law would generally govern the taking of game. Michael J. Bean & Melanie J. Rowland, *The Evolution of National Wildlife Law* 343 (3d ed. 1997). This federal-state partnership still remains in effect. *See* 36 C.F.R. § 261.8 (prohibiting hunting in National Forests only "to the extent Federal or State law is violated"). Hunting by tribal members exercising off-reservation treaty rights is commonplace. The U.S. Forest Service's Manual recognizes that many tribes have "off-reservation treaty rights," including "rights to hunt," on lands within the National Forest System. U.S. Forest Serv., U.S. Dep't of Agric., *Forest Service Manual* § 1563.8b(1) (2016). The Forest Service has reiterated its ongoing commitment to administering the lands under its control "in a manner that protects Indian tribes' rights and interests in the resources reserved under the treaty." *Id.* To that end, it has entered into various intergovernmental agreements with Indian tribes that possess such rights. *See, e.g.*, U.S. Forest Serv., U.S. Dep't of Agric., *Memorandum of Understanding Regarding Tribal-USDA-Forest Service Relations on National Forest Lands Within the Territories Ceded in Treaties of 1836, 1837, and 1842* (Mar. 2012), https://www.fs.fed.us/spf/tribalrelations/documents/agreements/mou_amd2012wAppendixes.pdf (discussing treaty-based hunting, fishing, and gathering rights of the Lake Superior Chippewa Indians on National Forest lands).

In Bighorn National Forest in particular, hunting is a popular activity.[16] Big game species are found at healthy, sustainable levels that have been growing. This is particularly true of elk, the species Clayvin Herrera was convicted of hunting.[16] The Wyoming Game and Fish Department ("WGFD") has consistently reported elk populations that exceed goals in most regions of the state, including in the regional herds around Bighorn.[17] In 2016, the combined trend-based population objectives for the Sheridan region fortification, North Bighorn, and South Bighorn elk herds had risen to approximately 7,800 elk.[18] The corresponding trend counts and populations for those herds in 2016, however, totaled 10,350 or 2,550 elk over the averaged population objectives.[19]

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[16] U.S. Forest Service (USFS), Big Game Hunting, https://www.fs.usda.gov/activity/bighorn/recreation/hunting (last visited Sept. 2, 2018).

[16] *See, e.g.*, USFS, *FY 2015 Monitoring and Evaluation Rep.: Bighorn National Forest* 59-63 (2016), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd497849.pdf.

[17] *See, e.g.*, WGFD, Wyoming 2017 Statewide Hunting Season Forecast, https://wgfd.wyo.gov/hunting/wyoming-hunting-forecast#elk (last visited Sept. 2, 2018); WGFD, *2016 Big Game Job Completion Reports*, https://wgfd.wyo.gov/Hunting/Job-Completion-Reports/2016-Big-Game-Job-Completion-Reports (last visited Sept. 2, 2018) (listing reports of 2016 state regional big game figures).

[18] WGFD, *2016 Big Game Job Completion Reports: Sheridan Complete Report* 145, 155, 175 (2016), https://wgfd.wyo.gov/WGFD/media/content/PDF/Hunting/JCRS/JCR_BGSHERCOMP_2016.pdf (totals combined).

[19] *Id.*

This robust elk population has resulted in increased hunting opportunities, bringing in substantial retail funding to the state.[20] WGFD plans to achieve its management system goals through more liberal/extended hunting seasons to continue to decrease the number of elk and bring them closer to population objectives in the interest of preservation of habitat and other species.[21] WGFD forecasts increased elk populations and hunter successes in the Sheridan region for the 2018 hunting season.[22]

In sum, the Tenth Circuit and courts below got this entirely wrong. National forest lands are unoccupied by people or governments by design, and if "occupied" at all, it is by fish and game, not settlers. That is what Congress intended when it passed the important legislation in 1891 that allowed the Executive Branch to create forest reserves. Further, by its explicit language in Section 10, Congress decreed that when the Executive created national forests on lands subject to treaty hunting rights, Indian rights to use those lands reserved in treaties and ratified agreements would be

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[20] Southwick Associates, *Economic Contributions of Big Game Hunting in Wyoming* 4, 8 (2017) (noting $224 million in related sales; "[e]lk is the most targeted species by resident and guided non-resident hunters").

[21] WGFD, Comprehensive Mgmt. Sys.: Ann. Rep. to U.S. Fish & Wildlife Serv. App. A-3 (2017), https://wgfd.wyo.gov/WGFD/media/content/PDF/About%20Us/Commission/WGFD_ANNUAL_REPORT_2017.pdf.

[22] WGFD, 2018 Season Setting Comm'n Notebooks Apr.: Elk Hunting Season Forecast 2, 6-7 (2018), https://wgfd.wyo.gov/about-us/game-and-fish-commission.

preserved, not repealed. The National Forest System was lobbied for and created by sportsmen, who wanted to ensure that hunting would not only be a pastime available to the landed elite, as it had become in Europe. Hunting has always been permitted in National Forests, and it is a common activity today. There is simply no conflict between Crow tribal treaty hunting rights and the purposes for which National Forests were created.

CONCLUSION

The judgment of the District Court of Wyoming, Sheridan County, should be reversed.

Respectfully submitted,

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No. 17-532

In The
Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ Of Certiorari To The District Court Of Wyoming, Sheridan County

BRIEF OF AMICI CURIAE STATES OF NEBRASKA, KANSAS, LOUISIANA, NORTH DAKOTA, SOUTH DAKOTA, AND TEXAS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Petitioner is precluded from relitigating the Crow Tribe's hunting rights within Wyoming and, more particularly, in the Bighorn National Forest.

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INTEREST OF AMICI STATES

The Amici States, like most litigants, have an interest in the finality of judgments, and correspondingly in the maintenance of doctrines that preclude repeated attacks by losing parties on settled matters of law. These interests reach their apex when the matter at hand implicates the scope of Amici States' sovereign authority within their borders. This is especially true in the realm of State-Tribal relations, where the location of a reservation boundary, the nature of a trust land acquisition, or the meaning of a 19th century treaty can have profound, real-world consequences as to who has the power to tax, who has the power to regulate, and who has the power to prosecute criminal offenses.

Put simply, which sovereign has the power to govern over particular subject matter within a particular geographic area matters greatly to government as well as to the governed. More specifically for this case, the finality and stability of what the federal judiciary has said the law is regarding that power matters at least as much. To that end, Amici States have a substantial interest in this Court's reaffirmation of the important doctrine of issue preclusion and in its limitation on expansive new exceptions to the doctrine.

This case concerns the preclusive effect of the federal judiciary's judgment on a settled issue of federal law: whether under an 1868 treaty the Crow Tribe of Indians retain unrestricted hunting rights in the "unoccupied lands of the United States," notwithstanding

the Tenth Circuit's conclusive 1995 holding to the contrary. It arises from Wyoming's misdemeanor prosecution of Petitioner, a Crow Tribe member, for elk hunting in the Bighorn National Forest in violation of Wyoming's game laws.

Despite the quintessentially local nature of the underlying facts, Petitioner's arguments in resistance to the issue preclusion doctrine as a bar to his affirmative criminal defense would have consequences far beyond tribal hunting rights in northern Wyoming. Petitioner invites the Court to import into the federal common law a broad—and heretofore unrecognized—automatic exception to issue preclusion where there has been "a change in the applicable legal context." This ill-defined, manipulable standard would incentivize losing parties to continually innovate new means of relitigating settled issues, even where, as here, the intervening "change" is dubious at best.

Amici States have an interest in this Court's rejection of these arguments. Assuming the Court remains assured that its grant of certiorari was appropriate, the Court should use this case as an opportunity to reaffirm its precedents concerning the doctrine of issue preclusion, clarify the limited nature of the exceptions to that doctrine, and repudiate Petitioner's expansive and destabilizing arguments to the contrary.

SUMMARY OF THE ARGUMENT

Petitioner proceeds from the false premise that his affirmative defense regarding tribal hunting rights is not precluded by the federal courts' decades-old judgment that those hunting rights terminated. *See Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 992 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996). In resisting issue preclusion, Petitioner argues for a dramatic expansion of a narrow exception to the doctrine where there has been a "change in the applicable legal context." Not only does Petitioner's fact-bound claim not meet the requirements for this limited exception, his desired expansion of the exception could lead to manipulation as losing parties maneuver to identify some precedent cited in the adverse opinion that appears to rest on reasons rejected in some other line of "intervening" decisions by the Supreme Court. Amici States aim to complement their sister State Wyoming's own arguments by pointing out how Petitioner's broad conception of this exception would undermine finality and stability in an area of law—State-Tribal relations—where jurisdictional certainty is of paramount importance.

Amici States will first summarize the well-established principles of issue preclusion and why the Wyoming state courts properly applied that doctrine below. Amici States will then demonstrate how Petitioner's overbroad, Restatement-based conception of the "change in the applicable legal context" exception to issue preclusion has not been recognized by this Court, would undermine the principle of judgment finality,

and, as illustrated by the facts of this case, would have destabilizing consequences on important jurisdictional questions in the sphere of State-Tribal relations.

ARGUMENT

I. The Wyoming state courts properly applied the doctrine of issue preclusion as a bar to Petitioner's affirmative criminal defense.

The doctrine of issue preclusion is designed to prevent parties who lose in one tribunal to "shop around for another." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1298-99 (2015). When two different tribunals are asked to decide the same issue, the second tribunal must usually follow the decision of the first tribunal. *Id.*

Issue preclusion bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted). The principle behind issue preclusion is straightforward: "[o]nce a court has decided an issue, it is 'forever settled as between the parties.'" *B & B Hardware*, 135 S. Ct. at 1302-03 (citing *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525 (1931)). Under the doctrine, once an issue is directly determined by a court of competent jurisdiction, that determination is conclusive and cannot be disputed in subsequent suits between the same parties or their

privies. *Montana v. United States*, 440 U.S. 147, 153 (1979).

Issue preclusion protects parties from the expense and vexation of multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent verdicts. *B & B Hardware*, 135 S. Ct. at 1302 (citing *Montana*, 440 U.S. at 153-54). Indeed, the goal of minimizing inconsistent verdicts "encourage[s] reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Moreover, issue preclusion "promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 96.

Issue preclusion is "central to the purpose for which civil courts have been established, the *conclusive resolution of disputes* within their jurisdictions." *Montana*, 440 U.S. at 153 (emphasis added). Simply put, "a losing litigant deserves no rematch after a defeat fairly suffered." *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 107 (1991).

Here, although Petitioner and his Amici are understandably eager to skip past the critical threshold question of issue preclusion, the application of the doctrine is straightforward on a fair *and complete* reading of the line of relevant decisions. As Respondent has ably and comprehensively described, and as Amici States will briefly summarize, the decided nature of the termination of the Crow Tribe's off-reservation hunting rights is clear.

Twenty years after *Repsis*, Petitioner (and, indeed, the Crow Tribe itself) seeks a rematch on precisely the legal issue his Tribe lost in 1996. Petitioner argues that the doctrine of issue preclusion does not bar him from relitigating off-reservation Wyoming hunting rights because *Repsis* lacks preclusive effect due to a "change in the applicable legal context." The basis of this argument is that *Repsis* relied exclusively on *Race Horse* and this Court effectively overruled *Race Horse* in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). Petitioner argues that *Mille Lacs* "thoroughly repudiated" *Race Horse*, the case on which *Repsis* relied, and that Petitioner should, therefore, be permitted to relitigate *Repsis* itself. *Id.*

But *Mille Lacs* did not overrule the relevant part of *Race Horse* on which *Repsis* relied. All parties agree that this Court rejected the doctrine of "equal footing" that *Race Horse* relied on in holding that Indian hunting rights are irreconcilable with state sovereignty. *Mille Lacs*, 526 U.S. at 206. Critically, however, this Court continued:

> [t]he equal footing doctrine was only part of the holding in *Race Horse*, however. We also announced an alternative holding: The treaty rights at issue were not intended to survive Wyoming's statehood.

Mille Lacs, 526 U.S. at 206. *Mille Lacs* did not explicitly overrule this alternative holding in *Race Horse*.

Mille Lacs acknowledged that *Race Horse* concluded that the rights in the treaty at issue in *Race*

Horse were not intended to survive statehood. *Id.* This Court then contrasted the treaty rights at issue in *Race Horse*, which had a "fixed termination point," with the *Mille Lacs* treaty, which had no fixed termination and did not tie the duration of rights to the occurrence of a clearly contemplated event. *Mille Lacs*, 526 U.S. at 207. It further explained that the treaty at issue in *Race Horse* "contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States" and the "happening of these conditions was 'clearly contemplated' when the Treaty was ratified." *Id.* at 207 (quoting *Race Horse*, 163 U.S. at 509).

But the Court never explicitly overruled its second holding in *Race Horse*. The *Mille Lacs* Court held that courts should determine whether the rights granted in a treaty were intended to terminate upon the happening of a clearly contemplated event, such as in *Race Horse*. At worst, this Court only refused to extend the holding in *Race Horse* beyond the precise treaty language present in *Race Horse*—the same language in *Repsis* and here. The Wyoming state courts thus properly found that *Race Horse*'s second holding remained good law since this Court had not overruled it, and that it precluded Petitioner from relitigating the ultimate holding in *Repsis*.

This Court has long taken the position that lower courts are not to conclude that its recent cases have impliedly overruled earlier precedent: "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of

decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 485 (1989)).

The facts, circumstances, and procedural posture of the present litigation illustrate the wisdom behind this Court's opinion in *Agostini*. Petitioner is asking this Court to greatly expand the exception to the doctrine of issue preclusion that limits issue preclusion due to a "change in the applicable legal context. *See Bobby v. Bies*, 556 U.S. 825, 834 (2009). Petitioner is asking the Court to hold that parties are not bound by issue preclusion when the binding decision was based on case precedent that may have been subsequently questioned, but not overruled. This runs contrary to the principle of *Agostini* and is flatly inconsistent with what this Court actually held in *Mille Lacs*.

II. This Court has never recognized the broad exception to issue preclusion urged by Petitioner.

It is upon the intersection of *Repsis* and *Mille Lacs* that Petitioner bases his primary—and farthest-reaching—argument for expanding the recognized exceptions to issue preclusion "where there has been a change in the applicable legal context." Pet. Br. 46-48. Petitioner bases his argument on *Bobby v. Bies*, 556 U.S. 825, 834 (2009), where the Court cited a comment

from the Restatement (Second) of Judgments that "an intervening change in the relevant legal climate may warrant reexamination of the rule of law applicable as between the parties." Restatement (Second) of Judgments §28 cmt. c.

Bies does not appear to represent the Court's formal adoption of the Restatement's broad exception to issue preclusion. This is particularly true, as Respondent has ably demonstrated, in light of the Court's long-standing articulation of a related—but justifiably narrow—standard for when issue preclusion should be withheld given an intervening development in the law:

> Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law.

Montana, 440 U.S. at 162 (emphasis original) (quoting *United States v. Moser*, 266 U.S. 236, 242 (1924)). This standard defeats issue preclusion only "for 'unmixed questions of law' in successive actions involving substantially unrelated claims." *Id.*

The exception as set out in *Montana* and *Moser* is superior in that it provides more concrete guidance to courts and litigants as to the circumstances in which a

prior final judgment will not enjoy the benefit of issue preclusion. Petitioner's Restatement-based alternative, on the other hand, would trigger the exception whenever a disappointed party can imagine a change in the legal "context," vague though that term may be. Here, the consequences of such a malleable standard are obvious, given that two of the freestanding reasons for the *Repsis* court's holding remained categorically valid even after *Mille Lacs* overruled the first reason. This should be a circumstance where issue preclusion still unquestionably applies based on the two undisturbed reasons in the prior case.

Here, there is no "unmixed question of law." Interpretation of the 1868 treaty is necessarily a fact-intensive endeavor, as the state court recognized in its careful, well-reasoned decision to apply issue preclusion. Pet. App. 25. This is not surprising, since the overwhelming majority of cases determining State-Tribal jurisdictional disputes based on 19th century treaties will involve mixed questions of fact and law. *See, e.g.*, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (fact-intensive analysis in reservation diminishment context); *Hagen v. Utah*, 510 U.S. 399 (1994) (same).

Were this Court to allow Petitioner to relitigate *Repsis*, no judgment would be safe. Every final judgment would be at risk of losing its preclusive effect between the parties and their privies the moment the underpinning legal authority can be called into question through mere reference to some intervening decision that criticizes a single component of the otherwise preclusive decision. This would invite relentless

litigation of settled issues until the non-prevailing party prevails, leading to abusive, vexatious and expensive litigation, waste of judicial resources, inconsistent results, and inability to rely on any adjudication. *See B & B Hardware, Inc.*, 135 S. Ct. at 1298-99, 1302; *Montana*, 440 U.S. at 153.

States and Tribes must be able to rely on past decisions and have finality between each other, particularly when such decisions directly implicate public safety considerations by delineating which sovereign may exercise law enforcement over a certain area, and the scope of the same. The alternative would breed jurisdictional chaos. Not only would Amici States be subject to litigation of previously decided issues—including, in all likelihood, on core jurisdictional issues stemming from century-old treaties decided (and relied on) for decades—they would be concerned with forum-shopping, including for relitigation of State-Tribal jurisdictional matters in non-federal forums ill-equipped to resolve such issues.

To be clear, Amici States do not accuse Petitioner of forum-shopping. But without jurisdictional certainty, individual parties could forum shop to relitigate such issues in forums that are ill-suited to that work. For example, Wyoming Circuit Courts, with original jurisdiction in all misdemeanor cases, Wyo. Stat. Ann. § 5-9-129. Like their counterparts in many other States, they are courts of limited jurisdiction with simplified rules to provide limited, focused discovery and expedited trial dates. Relitigating significant issues

regarding treaty-based State-Tribal jurisdictional boundaries during misdemeanor criminal prosecutions in such courts would tax judicial resources and increase the possibility of inconsistent decisions.

Moreover, and without at all casting doubt on the capacity of lower State courts, such courts are simply not the appropriate venues for the resolution of such significant and inherently federal issues. A strong issue preclusion doctrine serves as a safeguard against the relitigation of federal treaty questions in misdemeanor-level State courts, at least where, as here, the federal courts have already spoken. That is desirable from a policy perspective. Jurisdictional clarity and consistency would be ill-served if, for example, the issues decided by this Court several terms ago in *Parker*, 136 S. Ct. 1072, were continually relitigated in misdemeanor prosecutions in Nebraska county courts.

The need for jurisdictional certainty is particularly true in the context of State-Tribal criminal jurisdiction. For example, this term, in *Carpenter v. Murphy*, No. 17-1107 (U.S.), this Court will resolve a jurisdictional boundary dispute covering all of eastern Oklahoma and 1.8 million residents. However the dispute is resolved, it should be expected that both the State of Oklahoma and the Creek Nation respect the finality of the decision. It should also be expected that future clarification of issues addressed in *Carpenter v. Murphy* not be used as a "change in the applicable legal context" to undermine the finality of whatever decision is reached. Once a jurisdictional boundary is determined, that determination should

be final. Yet Petitioner's position would invite every criminal defendant in a successive prosecution to relitigate in state court the federal court's determination of the underlying jurisdictional boundaries. Pet. Br. 57. Such vexatious relitigation of settled jurisdictional issues would place no value on finality. Each successive prosecution should not spawn a renewed opportunity to undo the jurisdictional boundaries settled by the last.

The general rule of issue preclusion "is demanded by the very object for which civil courts have been established." *S. Pac. Ry. v. United States*, 168 U.S. 1, 49 (1897). The doctrine of issue preclusion protects the judicial system's vital interest in the finality of judgments. Allowing Petitioner to expand the recognized exceptions to the issue preclusion doctrine in order to relitigate *Repsis* would undermine this vital interest.

III. The Tenth Circuit's alternative basis for affirmance is independently preclusive.

Repsis provided an additional "alternative basis for affirmance of the district court's dismissal of the Tribe's action" that was not based on *Race Horse*. *Repsis*, 73 F.3d at 993. *Repsis* held that, at the time the 1868 treaty was executed, the land that is now the Bighorn National Forest was unoccupied and open for settlement. *Id.* However, 11 years later when Congress created the Bighorn National Forest, it expressly mandated that national forest lands were to be regulated for environmental purposes and "were no longer available for settlement." *Id.* Specifically, people could no

longer "timber, mine, log, graze cattle, or homestead" on national forest land without federal permission. *Id.* Accordingly, the Tenth Circuit held that the Crow Tribe had no right to hunt in the Bighorn National Forest because those lands are "occupied,"[1] since the treaty only reserved off-reservation tribal hunting rights to "unoccupied" lands. *Id.*; *see also* Pet. App. 45 (1868 treaty text).

Petitioner contends that the Tenth Circuit's holding that the Bighorn National Forest land is "occupied" should not be given preclusive effect. Pet. Br. 50. His primary argument on this point, and the one Amici States will address, again urges the adoption of an issue preclusion exception drawn from a comment to the Restatement (Second) of Judgments that this Court has never recognized. Specifically, he argues that if a "judgment by a court of first instance" relies on "determinations of two issues" that independently support the result, then the judgment is not preclusive on either issue. Pet. Br. 50 (citing Restatement (Second) of Judgments § 27 cmt. i.).

This position is contrary to this Court's precedent. This Court has held "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter, but each is the judgment of the court and of

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[1] The Wyoming state courts in Petitioner's case recognized that the *"Repsis* court also alternatively held that the treaty rights were no longer valid, because the creation of the Big Horn National Forest resulted in the occupation of the land." Pet. App. 22, 33 (internal quotation omitted).

equal validity with the other." *United States v. Title Ins. & Tr. Co.*, 265 U.S. 472, 486 (1924); *see also Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum").

Notably, not only has this Court not embraced this exception, it has been rejected by at least six circuits. The Second, Third, Seventh, Ninth, Eleventh, and D.C. Circuits have generally followed the traditional view that independently sufficient alternative findings that have been litigated and decided should be given preclusive effect. *See Ass'n of Battery Recyclers v. EPA*, 716 F.3d 667, 673 (D.C. Cir. 2013); *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 255 (3d Cir. 2006); *Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1402 (7th Cir. 1987); *Shellong v. INS*, 805 F.2d 655, 658-59 (7th Cir. 1986); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987); *Deweese v. Town of Palm Beach*, 688 F.2d 731, 734 (11th Cir. 1982); *In re Westgate-California Corp.*, 642 F.2d 1174, 1176-77 (9th Cir. 1981). In so doing, these courts relied on the general principles of issue preclusion, including finality and promoting judicial economy: "[a]pplying issue preclusion to independently sufficient alternative findings furthers the basic objectives of the doctrine." *See, e.g.*, *L'Oreal USA*, 458 F.3d at 254.

In support of applying the Restatement (Second) of Judgments comment as a new exception, Petitioner contends that a court's determination of an alternative basis may not have been as carefully or rigorously

considered. Pet. Br. at 50. This argument gives woeful short shrift to the Tenth Circuit's analysis, which consisted of an entire substantive section of its opinion. *Repsis*, 73 F.3d at 993. Hardly the "passing" conclusion described by Petitioner. Pet. Br. 51. Litigants should not assume that courts would give any less consideration to an independently sufficient basis to support its judgment. *L'Oreal USA*, 458 F.3d at 254. Courts are reasonably expected to craft findings that are the product of careful judicial reasoning, and the Tenth Circuit did so in *Repsis*. *Id*.

Next, Petitioner contends that the Tenth Circuit's alternative basis is legally and factually wrong and inconsistent with other court decisions. Pet'r Br. at 51. But even if the Tenth Circuit did err, this would not prevent issue preclusion. Issue preclusion bars litigation of wrong decisions to the same degree as correct ones. *B & B Hardware, Inc.*, 135 S.Ct. at 1308-09; *see also United States v. Moser*, 266 U.S. 236, 242 (1924) ("[A] fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of law.").

The Tenth Circuit in *Repsis* resolved the same issue sought to be relitigated here—*i.e.*, that the 1868 treaty hunting rights were no longer valid due to the creation of the Bighorn National Forest resulting in "occupation" of the land. This resolution was essential to the decision as an independently sufficient alternative basis that the treaty rights were no longer valid.

Title Ins. & Tr. Co., 265 U.S. at 486; *L'Oreal USA*, 458 F.3d at 255. To permit relitigation of alternative findings would "eviscerate a great number of judicial determinations that were the products of costly litigation and careful deliberation." *L'Oreal USA*, 458 F.3d at 255. Further establishing that the Tenth Circuit's alternative holding was essential to the judgment, is that it was capable of being appealed and that the Crow Tribe actually petitioned for certiorari on this issue. *See* Pet. Br. at 7, 22, 24, Supreme Court of the United States docket no. 95-1560; *see Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 100, 74 S. Ct. 414, 420, 98 L. Ed. 532 (1954) ("It is only when a finding of law or fact is not necessary for a decree that the prevailing party may not appeal and the finding does not form the basis for collateral estoppel.").

Petitioner, as a member of the Crow Tribe, should not be permitted to litigate, for the second time, the precise issue litigated by the State of Wyoming and Crow Tribe and resolved by the Tenth Circuit in Wyoming's favor. This Court should hold that Petitioner is precluded from relitigating whether the creation of the Bighorn National Forest rendered the land "occupied," thereby terminating the Crow Tribe's treaty rights to hunt those lands in violation of Wyoming's game laws. States must be able to rely on past decisions and the propriety of issue preclusion to protect against the burden of needless and vexatious relitigation of settled jurisdictional issues. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979).

"Denying preclusive effect to a finding that would support a court's judgment merely because the case was disposed of on other grounds as well would result in the inefficient use of private and public litigation resources." *L'Oreal USA*, 458 F.3d at 253. Litigants, particularly States that are often litigants to cases involving the clash of sovereign and jurisdictional interests, should not be denied preclusive effect of past decisions simply because the ultimate holding was based on multiple freestanding reasons. To hold otherwise would force defendants to gamble on only one legal theory in defense or only be entitled to issue preclusion on simple cases. *See L'Oreal USA*, 458 F.3d at 255 ("under the approach of the Second Restatement, the judicial findings in nearly any complex case would be unlikely to preclude subsequent relitigation of the same issues").

CONCLUSION

The judgment of the District Court of Wyoming should be affirmed.

Respectfully submitted,

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No. 17-532

In the

Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ of Certiorari to the District Court of Wyoming, Sheridan County

BRIEF OF PACIFIC AND INLAND NORTHWEST TREATY TRIBES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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September 11, 2018

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I. INTEREST OF THE AMICI[1]

Amici are Indian tribes in the Pacific and Inland Northwest, each of which is a signatory or political successor in interest to those tribes and bands that entered into one of several distinct treaties with the United States in 1854 and 1856, commonly referred to as the "Stevens Treaties".[2] These tribes ceded vast amounts of their territories to the United States, while reserving their rights to hunt and gather outside their Treaty-created reservations on "unclaimed" or "open and unclaimed lands."[3] Today,

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[1] Pursuant to Supreme Court Rule 37.2, Petitioner and Respondent have granted blanket consent to amicus briefs. None of the parties or their counsel authored any part of this brief in whole or in part or made any monetary contribution to fund the preparation or submission of the brief, and no person or entity other than Amici and their counsel made such a monetary contribution to the preparation or submission of this brief.

[2] A full list of Amici appears at Appendix A.1.

[3] Treaty between the United States and the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, art. I, 12 Stat. 945, 946 (June 9, 1855); Treaty with Nisqualli, &c, art. III, 10 Stat. 1132, 1133 (Dec. 26, 1854); Treaty between the United States and the Duwamish, Suquamish, and other allied and subordinate Tribes of Indians in Washington Territory, art. V, 12 Stat. 927, 928 (Jan. 22, 1855); Treaty between the United States of America and the S'Klallam, Skokomish, Toanhooch, and Chimakum Indians, art. IV, 12 Stat. 933, 934 (Jan. 26, 1855); Treaty between the United States and the Yakama Nation of Indians, art. III, 12 Stat. 951, 952 (1855); Treaty between the United States of America and the Nez Percé Indians, art. III, 12 Stat. 957, 958 (June 11, 1855); Treaty between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, art. III, 12 Stat. 975, 976 (July 16, 1855); Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians, art. III, 12 Stat. 971, 972 (Jan. 25, 1856); and, Treaty with the Tribes of

Amici Tribes continue to exercise their Treaty-reserved hunting and gathering rights, as the Indian signatories at the time of the Treaties understood them, on such lands, including National Forest lands located in (and, in some cases, spanning more than one of) the present-day states of Idaho, Montana, Oregon and Washington.

II. SUMMARY OF THE ARGUMENT

On the narrow question presented in this case concerning only the Crow Treaty of 1868, Amici Tribes write separately to emphasize: (1) the continuing significance of Treaty-reserved hunting and gathering rights; (2) that every state and federal court construing the Stevens Treaties based on the Indians' understanding has confirmed that National Forest land is "unclaimed" or "open and unclaimed land" within the meaning of these treaties; and (3) that early American hunting law, with which the United States' negotiators would have been familiar at the time of the Treaties, is consistent with the Indians' understanding that the Treaty right to hunt on "unoccupied lands" would include lands that are today National Forests.

Amici Tribes support the positions of Petitioner Herrera, the United States, and the Crow Tribe that this Court's ruling in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) forecloses the Wyoming lower court's reliance on *Ward v. Race Horse*, 163 U.S. 504 (1896) and *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996), to preclude inquiry into the Indian signatories' understanding of the Crow

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Middle Oregon, art. I, 12 Stat. 963 (June 25, 1855) (negotiated by Superintendent of Indian Affairs Joel Palmer).

Treaty's reserved right to hunt on "unoccupied lands of the United States." Amici Tribes also support Petitioner, the United States, and the Crow Tribe's position that *Crow Tribe of Indians v. Repsis* is a poorly reasoned outlier and further note that it is the only instance in which a court has concluded that mere designation of a National Forest by the United States could operate to "occupy" land, thus extinguishing the Treaty rights on the federal public lands at issue here.

III. ARGUMENT

A. Tribal Treaty Hunting, Deeply Rooted in Culture, Religion and Tradition, Is Vital

Since time immemorial, and continuing to this day, hunting, fishing and gathering have been central to Amici Tribes' subsistence, economy, culture, spiritual life, and day-to-day existence. These activities "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). Through treaties, tribes reserved these usufructuary property rights in perpetuity.

Amici have maintained their traditional culture, which depends heavily on the traditional use of natural resources. Amici Tribes' ability to subsist and thrive continues to require the ability to freely go beyond reservation boundaries to fish, hunt, and gather food when it is available. For millennia, Amici have hunted game and gathered botanicals to feed their families. These food sources remain vitally important to this day not only for traditional and ceremonial purposes, but also for tribal members' health and well-being.

Historically, Amici hunted all available wildlife and gathered all harvestable botanicals. These included big and small game animals, fur-bearing animals, birds and waterfowl; and, ferns, grasses, rushes and tails, root vegetables, fruits, nuts, seeds, herbs, mosses and fungi. Today, Tribal members continue to hunt and gather to supply foods for ceremonial and religious purposes such as the canoe journey, tribal weddings, funerals, name-giving, religious observance and potlatches.

Tribal hunters often hunt for others who cannot hunt for themselves, including Tribal elders. Tribal culture is based on extended family relationships of parents, grandparents, aunts, uncles, cousins and other relatives. A tribal hunter or gatherer typically shares the harvest with several families and, because the harvest is widely shared, it is used quickly, benefiting the whole community. The entire animal is used to the greatest extent possible, to minimize waste.

Today, consistent with their historical practices, Amici manage and co-manage resources with their federal and state counterparts, and assume the responsibilities that accompany their treaty-reserved rights through tribal hunting regulations and other mechanisms. Amici's co-management with their federal and state counterparts in Idaho, Montana, Oregon and Washington includes wildlife management, harvest allocation, and regulatory enforcement.

Tribal hunters and gatherers harvest a small fraction of the wildlife and botanical resources taken annually throughout the West. For example, in recent years in Washington State, tribal members have harvested between two and five percent of the state-

wide non-tribal elk and deer harvest, and tribal deer harvest remains lower than the yearly state roadkill rate. https://nwifc.org/about-us/wildlife/.

The continued exercise of Amici's hunting and gathering rights, including the exercise of those rights on National Forest lands, remains of critical and enduring importance. These rights were expressly reserved by the tribes in exchange for ceding vast amounts of their homelands to the United States. As the other party to the Treaties, the United States secured these rights to the Crow Tribe and to the Amici Tribes in their Treaties.

B. Treaty-Reserved Hunting in National Forests is Consistent with the Understanding of the Indian Parties to the Treaties as Confirmed by Every Court, State or Federal, Construing these Treaties

Construing Indian treaties involves an inquiry into the intent of the parties; the history of the negotiations, their purpose, and the context in which they occurred; and the practical construction adopted by the parties. *See Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-79 (1979). Indian Treaty language must "'be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'" *Id.* at 676 (quoting *Jones v. Meehan*, 175 U.S. 1, 11, 20 (1899)); *see also United States v. Washington*, 384 F. Supp. 312, 331 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

On the narrow issue before this Court of whether mere designation of a National Forest can serve to extinguish the Crow Tribe's 1868 Treaty-reserved right to hunt on "unoccupied lands of the United States," it is informative that every state and federal court construing the right to hunt on "unclaimed" or "open and unclaimed" land has held that the Indian parties to the Stevens Treaties would have understood the concept of a National Forest as consistent with "unclaimed" or "open and unclaimed" land to which the reserved hunting right would apply.

Courts, both state and federal, in Idaho, Montana, Oregon and Washington have long recognized National Forests as subject to reserved Indian treaty hunting rights. The Idaho Supreme Court, in *State v. Arthur*, interpreted treaty language reserving the Nez Perce Tribe's right to hunt on "open and unclaimed land" as expressly encompassing National Forest land. *State v. Arthur* construed this Treaty language by examining the understanding of the Treaty Indians, as reflected in the minutes of the Treaty negotiations kept by the United States,[4]

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[4] *State v. Arthur* recites Governor Stevens' promises at the treaty negotiations that "You will be allowed . . . to kill game on land not occupied by the whites" and Looking Glass would be able to "kill game and go to buffalo when he pleases, that he can get roots and berries on any of the lands not occupied by settlers." 261 P.2d at 140-41. Governor Stevens made similar assurances in other treaty negotiations. *See United States v. Washington*, 853 F.3d 946, 964 (9th Cir. 2017), *aff'd*, *Washington v. United States*, 584 U. S. ____, 138 S. Ct. 1832 (2018) (*per curiam)* (noting that Governor Stevens told the Indians during negotiations for the Point Elliott Treaty, "'I want that you shall not have simply food and drink now but that you may have them forever'"); *see also* Point No Point Treaty Council Minutes ("Mr. F. Shaw, the Interpreter, explained to them that they

which document Indian leaders emphasizing that "our rights shall be protected forever" and receiving assurances from Governor Stevens that they would continue to be able to hunt and gather on "lands not occupied by settlers". 261 P.2d 135, 140-41 (1953), *cert. denied*, 347 U.S. 937 (1954). The Idaho Supreme Court held that the term "open and unclaimed land" as employed in the treaty "[w]as intended to include and embrace such lands as were not settled and occupied by the whites...and was not intended to nor did it exclude lands title to which rested in the federal government, hence the National Forest Reserve upon which the game in question was killed was 'open and unclaimed land'." *Id.* at 141. *State v. Arthur* also rejected Idaho's argument that these Treaty-reserved rights were altered by statehood. *Id.* at 140.

In a case affirmed by the Ninth Circuit in which the Confederated Tribes of the Umatilla Indian Reservation sued to enforce their right to hunt in the Umatilla and Whitman National Forests, the federal District Court of Oregon held that "'unclaimed'" lands within the meaning of the treaty included National Forest lands. *Confederated Tribes of Umatilla Indian Res. v. Maison*, 262 F. Supp. 871, 873 (D. Or. 1966), *aff'd. sub nom, Holcomb v. Confederated Tribes of Umatilla Indian Res.*, 382 F.2d 1013 (9th Cir. 1967). The Court examined the understanding of the Indians and the treaty minutes, and emphasized

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were not called upon to give up their old modes of living and places of seeking food."; "Chits-a-Mah-han or the Duke of York...My heart is good. I am happy since I heard the paper read and since I have understood Gov. Stevens, particularly, since I have been told I could look for food where I pleased, and not in one place only.)."

the hunting right's application to lands "not actually occupied by white settlers"; the court elaborated that, "[t]o construe 'unclaimed lands' to exclude land not occupied by white settlers would violate the solemn promise made to Indians more than a century ago." 262 F. Supp. at 872. Both courts rejected Oregon's statehood arguments, independently examining the understanding of the Indians. 262 F. Supp. at 872; 382 F.2d at 1014.

The Montana Supreme Court in *State v. Stasso*, a case involving a member of the Confederated Salish and Kootenai Tribes hunting on National Forest land, examined the understanding of the Indian parties to the 1855 Treaty of Hell Gate, rejected Montana's statehood arguments, and held that "the National Forest lands involved here are open and unclaimed lands" within the meaning of the Treaty. 172 Mont. 242, 245, 248 (1977).

Washington State courts have concurred that "open and unclaimed lands" within the meaning of the Stevens Treaties encompass National Forest land. *State v. Miller*, 102 Wash.2d 678, 680 n.2 (1984) (noting that "[s]everal courts have determined that [National Forest] land is 'open and unclaimed' within the meaning of the treaty"); *State of Washington v. Young*, 97 Wash. App. 1043 (unpublished) (1999) (reversing conviction of Yakama Indian for hunting during state's closed season in a National Forest, based on treaty right to hunt).[5]

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[5] While only the issue of National Forest land is before this Court, courts have also upheld the right to hunt on other types of forest lands and in similar areas. *See, e.g., State v. Buchanan*, 138 Wash.2d 186, 211-12 (1999), *cert. denied*, 528 U.S. 1154 (2000) (rejecting Washington's statehood arguments and hold-

All of these cases, reviewing the understanding of the Indians at the time of the Stevens Treaties,[6] come to the same conclusion: the mere designation of a National Forest does not extinguish Treaty-reserved rights to hunt on those lands. The evidence pointed to by Petitioner, the Crow Tribe, and the United States demonstrates that it is inconceivable that the Crow negotiators would have understood that a National Forest designation would extinguish their hunting rights on those lands under the Crow Treaty.

C. Nineteenth Century American Hunting Law Principles Provide Additional Interpretative Context and Support The "Unoccupied" Status of Subsequent National Forests

An understanding of the nineteenth century American legal landscape provides additional support for the conclusion that the Big Horn National Forest should be treated as "unoccupied" for purposes of the Crow Treaty hunting right. While the primary interpretive inquiry is the understanding of the Treaty Indians, who were required to negotiate critical protections for themselves in a foreign language, contemporary American legal principles make plain that the United States would have understood subsequently created National Forests as "unoccu-

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ing that publicly owned wildlife area constitutes "open and unclaimed land" within the meaning of the treaty).

[6] Amici note that some of the dicta in these cases and some of the forums in which these issues were litigated (*e.g.*, state criminal prosecutions) are imperfect or incomplete with respect to a full and proper understanding and application of their Treaty-reserved rights. This does not detract from the unanimous, correct conclusions these courts have reached that Amici Tribes' reserved treaty hunting rights encompass National Forest land.

pied" land where hunting, including Treaty-reserved hunting, could occur. Understanding the common law landscape helps deduce the intent of the United States, which, although entitled to less weight than the Indian signatories' understanding, is part of the context of the treaty negotiations. *Mille Lacs*, 526 U.S. at 196 (stating that courts must "look beyond the written words to the larger context that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties"); *Olympic Airways v. Husain*, 540 U.S. 644, 650 (2004) (noting that the Court regularly considers the context of a treaty's negotiation and adoption to promote interpretations "consistent with the shared expectations of the contracting parties").

When the Indian Treaties were negotiated, there were no hunting laws in effect in the Western United States territories. Instead, lands free from settlement were open to hunting for all. Brian Sawers, *Property Law as Labor Control in the Postbellum South*, 33 Law & Hist. Rev. 351, 351 (2015) (noting that, in 1860, "most unfenced land in the United States was open to the wanderer"); *accord* Eric T. Freyfogle, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 33 (2007) (noting that, historically in America, "[h]unting and fishing were rather freely allowed except in cultivated fields and around houses"). This was a result of the United States' rejection, at the time of the American Revolution, of English laws restricting the majority of English citizens from hunting. In England, the King claimed ownership over all fisheries and wild animals, and, by creating Royal Forests and establishing qualification statutes, favored the landed gentry's right to hunt over that of the common citi-

zen. Thomas A. Lund, AMERICAN WILDLIFE LAW at 8-10 (1980). The American colonies rejected this aristocratic concept and instead chose the free taking of animals on all unsettled land. *Id.* at 24.

The right to access lands for hunting was not necessarily limited by ownership; rather, active settlement was required to bar access. For example, in a private lands context that predates the creation of National Forests, the South Carolina Constitutional Court of Appeals recognized a presumption that "the forests and unenclosed lands of this country" were open to hunters. *McConico v. Singleton*, 2 Mill Const. 244, 246 (1818). Two years after *McConico*, the same South Carolina court held that a hunter who entered a parcel of land enclosed by a dilapidated fence did not commit trespass. *Broughton v. Singleton*, 5 S.CL. (2 Nott & McC.) 338, 340 (1820).

This common principle of nineteenth century American law was borne out by the laws of the United States existing at the time the Crow Treaty was negotiated. For example, under the Homestead Act of 1862, the only way any person could lawfully "occupy" public land in the West was "for the purpose of actual settlement and cultivation." Act of May 20, 1862, Pub. L. 37-64 12 Stat. 392.

American law at time of the Crow Treaty, even from a non-Indian perspective, plainly required more for land to be considered "occupied" than just title ownership. The subsequently-created Big Horn National Forest would have been considered "unoccupied" for hunting purposes not only by the Treaty Indians – for them unquestionably so – but also by the United States negotiators and ratifiers of the Treaty. The vast woodland and prairie would have

been and, in many ways is still, considered the commons. It is federal public land that to this day is open to all hunting, including non-Indian recreational hunting.

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In the Pacific and Inland Northwest, some feared that adverse consequences would result from courts upholding the Amici's reserved hunting rights on National Forest land. These fears have not come to pass. Instead, these court decisions have resulted in increased acceptance of the tribes as wildlife and natural resource co-managers with their United States, Idaho, Montana, Oregon, and Washington counterparts.

In this case, considering the Crow Tribe's understanding of its Treaty-reserved hunting right and the evidence presented by Petitioner, the Crow Tribe and the United States, it is inconceivable that the Crow Treaty negotiators would have understood that the mere designation of lands as a National Forest would extinguish reserved hunting rights on those lands.

CONCLUSION

Amici Tribes respectfully urge the Court to reverse the judgment of the Wyoming district court.

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September 11, 2018

APPENDIX

APPENDIX A

This Appendix provides the names of federally-recognized sovereign Indian tribes which appear as Amici Curiae.

The Confederated Salish and Kootenai Tribes of the Flathead Reservation

The Confederated Tribes of the Umatilla Indian Reservation

The Confederated Tribes of the Warm Springs Reservation of Oregon

The Confederated Tribes and Bands of the Yakama Nation

The Hoh Tribe

The Jamestown S'Klallam Tribe

The Lower Elwha Klallam Tribe

The Muckleshoot Indian Tribe

The Nez Perce Tribe

The Nisqually Indian Tribe

The Nooksack Indian Tribe

The Port Gamble S'Klallam Tribe

The Puyallup Tribe of Indians

The Quileute Tribe

The Skokomish Indian Tribe

The Squaxin Island Tribe

The Stillaguamish Tribe of Indians

The Suquamish Tribe

The Swinomish Indian Tribal Community

The Tulalip Tribes of Washington

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STATE OF WYOMING,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF WYOMING, SHERIDAN COUNTY

BRIEF OF *AMICUS CURIAE* SAFARI CLUB INTERNATIONAL IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Safari Club International's ("Safari Club") missions are the conservation of wildlife, protection of the hunter, and education of the public concerning hunting and its use as a conservation tool. Safari Club carries out its conservation mission in part through its sister organization, Safari Club International Foundation. Safari Club is a nonprofit corporation incorporated in the State of Arizona, operating under § 501(c)(4) of the Internal Revenue Code, with principal offices and places of business in Washington, D.C. and Tucson, Arizona and a membership of approximately 50,000.

Safari Club has long been involved in litigation and other advocacy efforts to promote hunting, access to hunting, and sustainable-use conservation, including hunting opportunities on federal and other lands in Wyoming, Montana, and numerous other states. Many of Safari Club's members hunt in Wyoming (including in Bighorn National Forest), Montana, and other states potentially affected by treaties such as at issue here.

In this amicus brief, Safari Club will "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties." Sup. Ct. R. 37(1). This brief

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1. The following is provided pursuant to Supreme Court Rule 37. No counsel for a party authored this brief in whole or in part, and no counsel for a party and no party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than named *amicus curiae* made a monetary contribution to this brief. Counsel of Record for Petitioner and for Respondent consented to the filing of *amicus curiae* briefs in support of either or neither party.

provides information that will "be of considerable help to the Court." *Id.* Safari Club will address (1) the impacts of ruling in favor of Petitioner Clayvin Herrera ("Herrera"), including interfering with Wyoming's and other states' abilities to effectively and fairly regulate the harvest of game animals and with individual hunters' abilities to participate in sustainable-use conservation through hunting; and (2) why the "conservation necessity" doctrine, while potentially a useful fallback, (a) is inadequate to ensure that the exercise of hunting privileges carried out under authority of the Crow Tribe's 1868 Fort Laramie Treaty ("1868 Treaty") and other treaties with similar language does not interfere with state management of game animals and (b) removes decision-making concerning wildlife management from the branch of the government with the requisite expertise to make such decisions.

SUMMARY OF THE ARGUMENT

Confirming Herrera's alleged treaty right to hunt outside the boundaries of the Crow Tribe reservation will undermine Wyoming's management of its wildlife. A ruling in favor of Herrera's interpretation of the 1868 Treaty could be expansive in terms of both species hunted and lands on which they are hunted. The 1868 Treaty language expresses a dangerous view of wildlife management out of sync with modern practices. Herrera's asserted right to engage in unregulated hunting practices outside the boundaries of Crow Tribe reservation lands also would arguably conflict with the Crow Tribe's own approach to wildlife management. The Court should keep these concerns in mind as it determines whether these treaty hunting privileges should exist.

The "conservation necessity" doctrine, relied on by Herrera and several amici who support him, does not adequately address concerns about interference with Wyoming's management of its wildlife. Reliance on this doctrine would place ultimate wildlife management decisions in the hands of trial court judges who are not expert on the subject. This approach, which places the burden of proof on the state, contradicts the deference the courts normally would accord the state's decision-making and usurps Wyoming's authority over its wildlife. It also undermines the public process through which Wyoming establishes it wildlife regulations. The level of details found in the state's wildlife regulations highlights the difficulty of having those regulations subject to a *post hoc* review by a court. Finally, the narrow focus on "***conservation*** necessity" ignores other reasons, such as public safety and welfare, for the state's regulation of hunting.[2]

ARGUMENT

A. Unregulated off-reservation hunting by Crow Tribe members will undermine and jeopardize Wyoming's management and conservation of its wildlife.

Confirming Herrera's alleged treaty right to hunt outside the boundaries of the Crow Tribe reservation will undermine Wyoming's management of wildlife as that broad right could apply anywhere on federal and state lands within the reach of the treaty and on which hunting is allowed. The expansive language of the 1868 Treaty, and any treaty with similar language, heightens this concern. The 1868 Treaty expresses a strategy for the

2. Safari Club also generally agrees with and supports the arguments presented by Respondent State of Wyoming in its brief.

utilization of game that is the antithesis of the current-day approach to wildlife management and conservation. The treaty gives members of the Crow Tribe the "right to hunt on the unoccupied lands of the United States ***so long as game may be found thereon*** . . . ." Pet.App.5a (emphasis added). In effect, the 1868 Treaty on its face gives tribal members unfettered ability to hunt game on unoccupied lands until the game is depleted. It expresses a dangerous management approach (or maybe more accurately, a lack of an approach) that the state and federal governments have long abandoned.

At the time of the signing of the 1868 Treaty, states and the federal government had not yet corrected this approach to wildlife management, which could and did lead to virtual losses of complete populations of game. In the 19th century, unregulated take of wildlife contributed to near catastrophic population losses of numerous wildlife species. *See, e.g., All. for the Wild Rockies v. U.S. Dep't of Agric.*, 772 F.3d 592, 594 (9th Cir. 2014) (discussion of grizzly bear population reductions). In the 20th century, both federal and state legislatures abandoned the "so long as game may be found thereon" approach. In its place, they adopted management strategies designed to maintain healthy wildlife populations and prevent species decline.

Two examples highlight this fact, one from 100 years ago and one from 45 years ago. In the early 20th century, the United States signed treaties with other countries to protect the migratory birds they shared. *See* U.S. Fish and Wildlife Service, Bird Conservation Timeline, Important Dates in the Conservation of Migratory Birds ("Bird Timeline") (noting 1916 treaty with Great Britain (on behalf of Canada); 1918 adoption of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712, which implemented

the treaty; and similar treaties with Mexico and Japan).[3] The Bird Timeline explains that "[i]n the 1800s millions of birds were killed for food, feathers, and science – hats, market hunting, and scientific collecting. Overuse of natural resources was the norm."); *see also* Martha G. Vázquez, *Clipping the Wings of Industry: Uncertainty in Interpretation and Enforcement of the Migratory Bird Treaty Act*, 74 WASH. & LEE L. REV. ONLINE 281, 282–83 (2018) ("Conservationists and lawmakers at the turn of the century realized that even the most prolific of birds could be wiped out by overhunting and exploitation, and a movement quickly grew to 'save interesting species from possible extinction.' This movement culminated in the passing of the Migratory Bird Treaty Act (MBTA).").

In 1973, Congress passed the Endangered Species Act, 16 U.S.C. § 1531-1544 ("ESA"). The ESA provides the U.S. Fish and Wildlife Service and the states with authority to protect species that have declined to the point that they need special protections. Although the ESA authorizes administrative action solely with respect to species qualifying for federal protection, Congress also admonished that the law's purpose is to encourage conservation of all species, finding and declaring that:

> encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments ***and to better safeguarding, for***

3. https://www.fws.gov/birds/about-us/timeline.php (last visited November 19, 2018).

> ***the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.***

16 U.S.C. § 1531(a)(5) (emphasis added).

The 1868 Treaty, in contrast, established disappearance of game as its floor. This cannot be the standard by which any user, tribal or non-tribal, approaches the use of wildlife today. Modern wildlife managers recognize that wildlife resources are finite and the disappearance of any particular game species or population of a species harms everyone—the tribal members who want to hunt those species; the other species of wildlife that prey on those game species or that benefit from those game species' presence in the ecosystem; the non-tribal hunters who rely on those species for food, revenue and recreation; and the non-hunters who enjoy wildlife-viewing.[4]

This Court should reject any interpretation of the 1868 Treaty that would allow tribal members to completely disregard and undermine wildlife management programs designed to conserve game and other wildlife species that state and federal governments are successfully implementing to maintain healthy wildlife populations to the benefit of all those who utilize and otherwise enjoy them.

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4. The treaty considered by this Court in *Minnesota v. Mille Lacs Band of Chippewa Indians* is distinguishable because it did not provide tribal members with the privilege to hunt to the complete exhaustion of the wildlife. Instead, the treaty at issue provided "'[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied *[sic]* to the Indians, during the pleasure of the President of the United States.' 1837 Treaty with the Chippewa, 7 Stat. 537." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 177 (1999) ([sic] in original).

In addition, the expansive right suggested by the 1868 Treaty's "so long as game may be found thereon" approach would arguably apply well beyond Herrera's take of elk in Bighorn National Forest. If this Court upheld the 1868 Treaty as advocated by Herrera, the ruling would facilitate unregulated take of numerous species on numerous types of lands.

For example, although Herrera's conviction arose from the taking of elk, the implications of this Court's decision to uphold the privileges of the 1868 Treaty would presumably apply to any wildlife species that all members of the Crow Tribe could attempt to hunt under protection of the 1868 Treaty. In a "Joint Action Resolution of the Crow Tribe to Enact and Declare Official Crow Tribal Policy of Fully Exercising Off-Reservation Hunting Rights Pursuant to the 1868 Fort Laramie Treaty" ("Joint Action Resolution"), the Crow Tribe's Executive Branch and Legislature declared that they defined the off-treaty hunting privileges provided in the 1868 Treaty to apply to "all native species of animals found in the traditional Crow homeland" and that the species would include but not be limited to "buffalo, elk, mule deer, white-tailed deer, black bear, grizzly bear, big horn sheep, shiras moose, grey wolves, pronghorn antelope, mountain lion, bobcat, wolverine, badger, beaver, sharp-tailed grouse, ruffed grouse, sage grouse, blue or dusky grouse, prairie chicken, wild turkey, waterfowl, birds of prey, and all fur-bearing animals." *Wyoming v. Herrera*, Record on Appeal, CT 2014-2687; 2688 at 352, 354, SCI.App.1a, 6a.[5]

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5. The Appendix provided by Safari Club contains the pertinent pages of the Joint Action Resolution and those portions of the Crow Reservation Fish and Game Code to which Safari Club cites in this brief

This Court's ruling will also not apply exclusively to the Bighorn National Forest, where Herrera hunted elk in violation of Wyoming's regulations, but could potentially extend to all lands that the Crow Tribe considers to be covered by the 1868 Treaty. In the Joint Action Resolution, the Crow Tribe's Executive Branch and Legislature identified those lands as "all federal lands managed by the United States Forest Service as national forests and national grasslands, all federal lands managed by the National Park Service as national parks and national recreation areas, all federal lands managed by the United States Fish and Wildlife Service as national wildlife refuges, and all federal lands managed by the Bureau of Land Management as national monuments, national recreations areas, and all such other BLM lands managed for multiple-use or resource preservation, and all federal lands managed by the Army Corps of Engineers and Bureau of Reclamation." The Joint Action Resolution indicated that the Crow Tribe would honor any special designation by the U.S. Congress under statutes designating federal lands as off-limits to hunting. *Id.* at 354, SCI.App.5a.[6]

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6. One unanswered question is how this acknowledgement would apply to National Park Service lands whose enabling statute contains no specific prohibition against hunting. Arguably, for these National Parks, Congress has made no designation "under statute" for the lands to be "off-limits to hunting." Nevertheless, the National Park Service has adopted regulations that prohibit hunting on any National Park where Congress has either specifically prohibited hunting or where Congress has remained silent on the subject. 36 C.F.R. § 2.2. A strict reading of the Joint Action Resolution suggests that the Crow Tribe would consider National Parks with no statutory hunting prohibition to be open to tribal hunting (in conflict with the NPS regulation).

While the Crow Tribe manages the wildlife that occupy the lands within the boundaries of the Tribe's reservation, the Tribe does not currently apply those conservation strategies to wildlife outside reservation boundaries. The Crow Reservation Fish and Game Code ("Code"), Title 12 of the Crow Law and Order Code, demonstrates that the Crow Tribe's management of hunting within reservation boundaries is conservation-motivated. For example, the Code describes the Tribe's Conservation Policy as follows:

> It shall be and is hereby established as the policy and intent of the Crow Tribal Fish and Game Commission, as established by the Crow Tribal Council, to provide an adequate and flexible system for the protection and conservation of all forests (whenever they are designated as wildlife habitat), fish and game resources ***within the Crow Indian Reservation***; to provide for the general management and supervision of all wildlife, fishery and outdoor recreational activities ***on the Crow Indian Reservation***, including but not limited to, the establishment of rules, regulations and ordinances ***relating to the harvest of Fish and Game on the Crow Indian Reservation***, the establishment of prohibited acts and penalties in regard to wildlife, fishery, and outdoor recreational activities ***on the Crow Indian Reservation***.

Code, 12-3-101, *Wyoming v. Herrera*, Record on Appeal, 591, 597, SCI.App.11a (emphasis added). The Code emphasizes that its regulations apply exclusively to the lands within the external boundaries of the Crow Tribe reservation:

> It is the policy of the Crow Tribal Council to exercise the inherent sovereignty of the Crow Indian Nation over all land and waters within the exterior boundaries of the Crow Indian Reservation. Henceforth all hunting and fishing within the exterior boundaries will be regulated by the Tribal Council through the Crow Tribal Fish and Game Commission as set forth in this title. Any previous resolution of the Tribal Council to the contrary is hereby rescinded.

Id., Code, 12-1-101 at 594, SCI.App.10a. The Code offers no similar policy or provisions applicable to conservation outside reservation boundaries. The Tribe did initiate action to adopt a set of harvest regulations applicable to off-reservation hunting. During their Special Joint Session, the Tribe's Executive Branch and Legislature included as part of their resolution the following intention:

> The Crow Tribe intends to enact regulations governing the exercise of all off-reservation treaty hunting conducted by Crow tribal members through an amendment to the Crow Fish and Game Code as contained in Title 12 of Crow Law and Order Code. Such regulations shall, at a minimum, include procedures for issuance of treaty licenses, the establishment of treaty-hunting seasons, harvest quotas, enforcement procedures including penalties for violations, inter-governmental agreements including cooperative habitat improvement projects, and other conservation-based regulatory measures.

Joint Action Resolution, *Wyoming v. Herrera*, Record on Appeal at 354, SCI.App.6a. Nothing in the Record on Appeal from the Wyoming state court demonstrates that the Crow Tribe ever amended their Fish and Game Code, as expressed in the Joint Action Resolution, to promulgate regulations for tribal hunting on lands outside of the reservation. Consequently, although the Crow Tribe recognizes and observes the need for conservation-based management of wildlife harvesting, it has not taken the steps to regulate its members' hunting practices outside of reservation boundaries.

The asserted treaty right is broad in both species and lands covered. The language of the 1868 Treaty suggests an outdated and destructive management standard. Exercise of the hunting activities under Herrera's view of the treaty would undermine Wyoming's efforts to sustainably manage its wildlife for all residents and visitors to the State. It also would arguably conflict with the Crow Tribe's own approach to wildlife management. The Court should keep these concerns in mind as it determines whether the treaty hunting privileges should continue in the manner suggested by Herrera and the amici who support him.

B. The conservation necessity doctrine inadequately protects the states' interests in wildlife management.

The "conservation necessity" doctrine, which Herrera and several amici have raised,[7] is an inadequate vehicle to

7. *See, e.g.*, Herrera Br. at 44–45; U.S. Br. at 18–19, 29 n.4; Natural Resources Law Professors Br. at 23; Crow Tribe Br. at 33; Shoshone-Bannock Tribes Br. at 17; Indian Law Professors

address Wyoming's (and other affected states') ability to properly manage its wildlife in the face of hunting under the 1868 Treaty (and similar treaties).[8]

Herrera and the amici that support his arguments assert two related reasons why the "conservation necessity" doctrine is relevant to this case. First, Herrera attempts to use the doctrine to reassure the Court that ruling in Herrera's favor will not have an adverse impact on Wyoming's management of its wildlife. Herrera Br. at 44–45. Second, amici argue that the conservation necessity doctrine helps reconcile treaty rights with state sovereignty over wildlife, so "statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather . . . ." National Congress of American Indians Br. at 19–21, *quoting Mille Lacs Band of Chippewa Indians*, 526 U.S. at 205; *see also* U.S. Br. at 18–19 (discussing reconciling treaty rights with state sovereignty over natural resources). Neither argument is persuasive because the doctrine cannot substitute for (and will undermine) the State's science-based decision-making on wildlife management.

This Court has developed and described the conservation necessity doctrine over the years. "[W]e see no reason why the right of the Indians may not also

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Br. at 11–12 n.2.

8. The conservation necessity doctrine is not an issue directly on appeal in this case. *See* Herrera Br. at 17 n.10; U.S. Br. at 7; *see also* Wyoming Br. at 62 (noting the United States' suggestion that the parties return to the state courts to litigate this issue). Because several briefs have discussed it in detail, Safari Club addresses it here.

be regulated by an appropriate exercise of the police power of the State. . . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392, 398 (1968). "The 'appropriate standards' requirement means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure, . . . and that its application to the Indians is necessary in the interest of conservation." *Antoine v. Washington*, 420 U.S. 194, 207 (1975) (citations omitted). The Court seemed to adopt a strict view. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 682 (1979), *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979) ("[T]reaty fishermen are ***immune from all regulation*** save that required for conservation.") (emphasis added). The burden of proof is on the state. *Antoine*, 420 U.S. at 207.

While the doctrine potentially provides an important check on unregulated harvest under treaty rights, for several reasons it is an inadequate vehicle to address fully this concern.

First, application of the conservation necessity doctrine will place ultimate responsibility for the State's wildlife management in the courts. Trial courts are not well-equipped to determine the "conservation necessity" of a focused aspect of a comprehensive wildlife management scheme. *See New York City Friends of Ferrets v. City of New York*, 876 F. Supp. 529, 540 (S.D.N.Y. 1995) (in case involving regulation of domestication of a wild animal,

"courts are . . . ill-advised and ill-equipped to intrude upon the legislative and agency decisionmaking process . . . ."), *aff'd*, 71 F.3d 405 (2d Cir. 1995). Courts are qualified to review agency decision-making on wildlife issues under a deferential standard of review. *See* WYO. STAT. ANN. § 16-3-114(a); *Laramie Range Found. v. Converse Cty. Bd. of Cty. Comm'rs*, 290 P.3d 1063, 1070 (Wyo. 2012) (court defers to administrative agency when agency makes a factual finding). But weighing the scientific necessity of particular hunting (and fishing) regulations and reaching a decision is a legislative/executive function more than a judicial one.

For example, the United States suggests that the conservation necessity doctrine calls for a narrow review of whether the regulation at issue (here, the 2014 elk hunting season and harvest limits) is necessary in the interest of conservation. U.S. Br. at 29 n.4. The problem is that the State manages wildlife and the harvest of game animals with all species and uses in mind, not in isolation and focused on any one species. *See* WYO. STAT. ANN. § 23-1-103 ("For the purpose of [1939 Wyo. Sess. Laws 83-116], all wildlife in Wyoming is the property of the state. It is the purpose of this act and the policy of the state to provide an adequate and flexible system for control, propagation, management, protection and regulation of ***all Wyoming wildlife***.") (emphasis added).

One amicus has already suggested that "[n]o such conservation necessity exists here; elk populations in Bighorn National Forest are actually higher than the desired management goal." Natural Resources Professors Br. at 23. Resolution of this issue in the courts could lead to simplistic, unsupported assertions like that made by

the Natural Resources Professors.[9] Although, in isolation, regulating the illegal take of four elk may not appear necessary for the conservation of the species, when all harvest and other mortality causes are considered, as they must be, the necessity of regulating any single take becomes crucial.

Second, placing the burden on the state agency to prove that its regulations on seasons, take methods, bag limits, etc. are necessary for the conservation of the species conflicts with the usual deference that the courts accord administrative agency decision-making, especially in areas that require technical and scientific expertise. *Antoine*, 420 U.S. at 207 (burden of showing necessity on state); Crow Tribe Br. at 33 (discussing cases); *Joe Johnson Co. v. Wyo. State Bd. of Control*, 857 P.2d 312, 314 (Wyo. 1993) (deferring to agency's "specialized knowledge and expertise," particularly where agency's actions "involve an area of such technical complexity"); *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976) (because analysis of the relevant factors "requires a high level of technical expertise," court must defer to "the informed discretion of the responsible federal agencies"); *Balt. Gas & Electric Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential.").

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9. Another amicus similarly concluded that Wyoming has "not established 'that applying the ban on out-of-season hunting of [elk] by the Indians on the land in question is in any way necessary or even useful for the conservation of [elk].'" National Congress of American Indians Br. at 20, *quoting Antoine*, 420 U.S. at 207. The species at issue in *Antoine* was deer, but National Congress amici assert that the same conclusion applies to the elk at issue here.

Third, subjecting hunting regulations to a trial court determination of "conservation necessity" usurps the broad authority and obligation Wyoming law places on its wildlife management authorities. Wyoming's constitution expresses the duty of the state to manage and conserve its wildlife for all its people. An amendment to the constitution, approved by resolution and ratified by a vote in November of 2012 states:

> The opportunity to fish, hunt and trap wildlife is a heritage that shall forever be preserved to the individual citizens of the state, subject to regulation as prescribed by law, and does not create a right to trespass on private property, diminish other private rights or alter the duty of the state to manage wildlife.

WYO. CONST. art. I, § 39. Wyoming law gives to the Fish and Game Commission multiple responsibilities for managing the state's wildlife:

> (a) The commission is directed and empowered:
>
> > (i) To fix season and bag limits, open, shorten or close seasons including providing for season extensions for hunters with disabilities as established by commission rules and regulation, on any species or sex of wildlife for any type of legal weapon, except predatory animals, predacious birds, protected animals, and protected birds, in any specified locality of Wyoming, and to give notice thereof;

> (ii) To establish zones and areas in which trophy game animals may be taken as game animals with a license or, with the exception of gray wolves, in the same manner as predatory animals without a license, giving proper regard to the livestock and game industries in those particular areas;

WYO. STAT. ANN. § 23-1-302. Wyoming law also gives the Commission power to close particular areas to hunting and fishing:

> (c) When any commission order closes any area of land, lake, or stream from hunting or fishing, a concise description of the area, lake, or stream closed shall be posted in the manner and place determined by the commission to be adequate notice of the closure.

Id. § 23-1-303. Instead of leaving the decision to the expertise of the state management authority, the conservation necessity doctrine puts a non-expert trial court judge in the position of second-guessing the expert fish and game decision-makers. The Court should avoid an interpretation of the law and facts that puts the lower courts in this position.

Fourth, subjecting the State's game management regulations and decisions to an evidentiary hearing to make these narrow findings would undermine the public process state game and fish agencies undergo to adopt their regulations. When the Wyoming Commission exercises this authority, it must do so "in accordance with

the provisions of the Wyoming Administrative Procedure Act," which includes public notice and comment. *Id.* § 23-1-303(e); *Id.* § 16-3-102; *Id.* § 16-3-103 (rulemaking requirements, including public notice and comment). In conflict with these requirements, the public would be excluded from the review under the conservation necessity doctrine in a trial court. Although agency rules and regulations are subject to judicial review, *see id.* § 16-3-114(a), the process involves the reviewing court to accord deference and place the burden of proof on the party challenging the regulation, a proceeding different than an evidentiary hearing with the burden on the state. *See Pfeil v. Amax Coal W., Inc.*, 908 P.2d 956, 962 (Wyo. 1995) ("The burden of proving a lack of substantial evidence rests upon the party attacking the agency's decision.").

Fifth, the level of detail found in the Wyoming fish and game regulations highlights the difficulty of having those regulations subject to a *post hoc* review for "conservation necessity" by a trial court judge based on an evidentiary record. The federal land unit at issue in this case, the Bighorn National Forest, has nine "Elk Hunt Areas" under state law.[10] Wyoming's Fish and Game Commission has adopted very specific regulations regarding elk hunting in the State, including unique regulations for each of the State's "Hunt Areas," which involve:

- season dates, age and gender restrictions, quotas, license requirements, and other limitations, Chapter 7, Elk Hunting Seasons, at 7–5 to -7;

- special archery seasons, *id.* at 7–20 to -21; and

10. The hunt areas are 34-41, 45. https://wgfd.wyo.gov/Regulations/Regulation-PDFs/REGULATIONS_CH7_MAP.pdf (last visited November 19, 2018).

- special early seasons for hunters with disabilities, *id.* at 7–21.[11]

The Commission has already weighed numerous factors and scientific and other data to arrive at the most appropriate harvest goals, seasons, methods of take, gender or age restrictions, and any other appropriate restrictions. If state wildlife managers must account for a future unknown level and manner of harvest by tribe members, they will face difficulties in formulating the appropriate regulations in the first instance.

The conservation necessity doctrine places an impossible burden on the states to provide evidence of conservation need despite being prevented from collecting much of the data essential to make scientific judgments about the need for regulation. For example, Crow Tribe members who harvest wildlife outside of the reservation would not be required to obtain hunting licenses, depriving the state of information about the number of hunters seeking game. Similarly, Crow Tribe hunters would not need to report their harvests to the state, making it impossible for state managers to calculate the number or sex of animals taken by tribal hunters during or out of the season. Unregulated hunting by tribal members means the loss of key data used by state managers to establish seasons, bag limits and other parameters for non-tribal hunters. Consequently, state management authorities must either overcompensate in regulating the use by non-tribal hunters or wait until the game species shows a significant decline to take action.

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11. https://wgfd.wyo.gov/Regulations/Regulation-PDFs/REGULATIONS_CH7.pdf (last visited November 19, 2018).

Sixth, the State may have reasons unrelated to conservation of wildlife to regulate the manner and methods of take, such as public safety and welfare. For example, Wyoming has regulations about the times of the day hunters can hunt game animals. WYO. ADMIN. CODE, WYO. GAME AND FISH COMM'N, HUNTING, Ch. 2 § 5 ("Big game, trophy game and small game animals may only be taken from one-half (1/2) hour before sunrise to one-half (1/2) hour after sunset."); *see also id.* § 8 (emergency closures), § 12 (use of aircraft to spot game animals), §§ 15-17 (transportation of deer, elk, and moose within, out of, and into Wyoming because of concerns over chronic wasting disease). While these regulations involve wildlife, their purposes are not limited to conservation. Hunting hours relate to safety issues; use of aircraft relates to fair chase principles; transportation limitations relate to concerns about transmission of disease to domesticated animals. If treaty-right hunting implicates these issues, the interests of the State unrelated to conservation would not be accounted for by the trial court.

But the case law is not clear whether such concerns would fall under the conservation necessity doctrine. *Compare Mille Lacs Band of Chippewa Indians*, 536 U.S. at 205 (Court has "repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights ***in the interest of conservation***.") (emphasis added) *with Wisconsin v. Matthews*, 248 Wis. 2d 78, 96 (Wis. App. 2001) ("We do not read the Court's language [concerning the conservation necessity doctrine] as excluding the possibility that regulation may be appropriate for other compelling reasons."). If the conservation necessity doctrine is limited to "conservation," as suggested by this

Court's decisions, these other important factors will not be considered by the trial court.

The conservation necessity doctrine forces the wrong kind of decision-making. The impact of the State's inability to fully manage wildlife through regulated take is inevitably borne by the wildlife and those who wish to use it. Those most likely to pay a price are the non-tribal hunters who abide by state regulations but must absorb the unregulated tribal use in the form of less available game or over-aggressive state regulation designed to offset unreported tribal use.

For all these reasons, the Court should proceed with caution in relying on the conservation necessity doctrine to protect the State's paramount interest in the management and conservation of its wildlife.

CONCLUSION

The hunting practices memorialized in the 1868 Treaty do not reflect the approach that the U.S. government, the states, and even the Crow Tribe itself have utilized in the management and conservation of wildlife. To restore those unregulated harvest practices would undermine modern wildlife management and conservation that has reversed the damage inflicted by the type of "hunt so long as game may be found thereon" approach expressed in the treaty language and similar language of many other treaties signed over a century ago. The conservation necessity doctrine is not adequate to remedy the problems that would be caused by a ruling that would reinstate unregulated taking of this country's wildlife.

The Court should reject any ruling in this case that would restore such an approach to wildlife use or that relies on the conservation necessity doctrine to remedy the concerns. Safari Club asks this Court to affirm the rulings of the Wyoming state courts.

Respectfully submitted,

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APPENDIX

APPENDIX A — JOINT ACTION RESOLUTION OF THE CROW TRIBE TO ENACT AND DECLARE OFFICIAL CROW TRIBAL POLICY OF FULLY EXERCISING OFF-RESERVATION HUNTING RIGHTS PURSUANT TO THE 1868 FORT LARAMIE TREATY, MAY 7, 2013 CROW TRIBAL LEGISLATURE, JAR NO. 13-09, (FROM *WYOMING V. HERRERA*, RECORD ON APPEAL, CT 2014-2687; 2688)

MAY 7, 2013 CROW TRIBAL LEGISLATURE

JAR No. 13 -09

Introduced by Chairman Darrin Old Coyote
Crow Tribal Executive Branch

Co-Sponsored by Senator Conrad J. Stewart
Black Lodge District

A Joint Action Resolution Titled:

A JOINT ACTION RESOLUTION OF THE CROW TRIBE TO ENACT AND DECLARE OFFICIAL CROW TRIBAL POLICY OF FULLY EXERCISING OFF-RESERVATION HUNTING RIGHTS PURSUANT TO THE 1868 FORT LARAMIE TREATY

Legislative Findings:

WHEREAS, Article V, Section 2(a) of the Crow Tribal Constitution vests the Crow Tribal Legislature (hereinafter "Legislature") with the power and duty to

promulgate and adopt laws and resolutions in accordance with the Crow Tribal Constitution and federal law for the governance of the Crow Tribe; and

WHEREAS, Article IV, Section 4(a) of the Crow Tribal Constitution provides that the "general duties" of the Executive Branch Officials shall include the duty to implement all laws, resolutions and policies duly adopted by the Legislature; and

WHEREAS, the Crow Tribe has always valued hunting and gathering in Crow Country as an activity of the highest cultural importance and the means for survival; and

WHEREAS, the 1851 Fort Laramie Treaty, which is recorded in the United States session laws at 11 Statutes at Large 749, recognized in Article V that the territory of the Crow Nation is recognized as follows: "[C]ommencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth;" and

WHEREAS, Article V of the 1851 Fort Laramie Treaty further provides that the Crow Tribe did not abandon or prejudice any rights or claims to any other

lands and, further, that the Crow Tribe not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described; and

WHEREAS, according to the oral history of the Crow Tribe the traditional territory of the Crow Nation extended all areas within the four teepee poles: to wit, the North Pole at the Bear's Paw Mountains in northern Montana, the West Pole at the Absaroka and Bear's Tooth Mountains in-south-central Montana, the South Pole at the Wind River Range of central Wyoming, and the East Pole at the Black Hills of western South Dakota and northeastern Wyoming; and

WHEREAS, upon agreeing to reside on a reservation which reduced the size of their homeland to approximately eight million acres, the leaders of the Crow Tribe secured the Tribe's right to hunt on all unoccupied lands of the United States through Article IV of the 1868 Fort Laramie Treaty with the United States, which is recorded in the United States session laws at 15 Statutes at Large 649 and provides that the Crow Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon;" and

WHEREAS, the United States Congress has never abrogated the aforementioned Crow tribal treaty hunting right; and

WHEREAS, in 1995 the Tenth Circuit Court of Appeals ruled in *Crow Tribe v. Repsis*, also known as the "Ten Bear Decision" that the Crow treaty right to hunt in

the Bighorn National Forest of Wyoming was abrogated in 1890 by virtue of Congressional passage of the Wyoming statehood act, but in 1999 the United States Supreme Court in *Minnesota v. Mille Lacs Band of Chippewa* reversed the case law which the Tenth Circuit based its decision on in *Repsis;* and

WHEREAS, William Canby, distinguished Senior Judge for the United States Court of Appeals for the Ninth Circuit and author of *Indian Law in a Nutshell* has written that the rule set forth in the Tenth Circuit's *Repsis* decision cannot be relied upon because it was "squarely rejected" by the *Mille Lacs* decision; and

WHEREAS, the State of Montana currently recognizes the Shoshone-Bannock as having an off-reservation treaty right to hunt under the 1868 Fort Bridger Treaty, which contains the same language as the 1868 Fort Laramie Treaty as it pertains to hunting and the State of Montana also recognizes off-reservation treaty hunting rights held by the Salish-Kootenai, Nez Perce, and Warm Springs Umatilla, including in areas that were recognized as Crow Country under the 1851 Fo:1 Laramie Treaty and were part of the Crow Indian Reservation until 1882; and

WHEREAS, the time has come for the Crow Tribe to fully exercise its hunting rights guaranteed by past tribal leaders through the treaties with the United States.

Appendix A

NOW, THEREFORE, BE IT HEREBY RESOLVED BY THE EXECUTIVE BRANCH AND LEGISLATURE IN SPECIAL SESSION:

Section 1. Establishment of Tribal Policy. The policy of the Crow Tribe shall be to exercise fully its treaty right to hunt on all unoccupied lands of the United States which are located within the traditional Crow homeland, as set out in the 1851 Fort Laramie Treaty, along with all such lands as located in traditional Crow territory according to tribal oral history.

(a) It shall be tribal policy to consider the term "unoccupied lands of the United States" as contained in Article IV of the 1868 Fort Laramie Treaty to include all federal lands managed by the United States Forest Service as national forests and national grasslands, all federal lands managed by the National Park Service as national parks and national recreation areas, all federal lands managed by the United States Fish and Wildlife Service as national wildlife refuges, and all federal lands managed by the Bureau of Land Management as national monuments, national recreation areas, and all such other BLM lands managed for multiple-use or resource preservation, and all federal lands managed by the Army Corps of Engineers and Bureau of Reclamation. All federal lands specifically designated by the United States Congress under statute as off-limits to hunting generally shall be honored as such by the Crow Tribe.

(b) It shall be tribal policy to consider the phrase "so long as game may be found thereon" as contained in

Appendix A

Article IV of the 1868 Fort Laramie Treaty to include all native species of animals found in the traditional Crow homeland as identified in the 1851 Fort Laramie Treaty. Such species shall include but not be limited to: buffalo, elk, mule deer, white-tailed deer, black bear, grizzly bear, big horn sheep, shiras moose, grey wolves, pronghorn antelope, mountain lion, bobcat, wolverine, badger, beaver, sharp-tailed grouse, ruffed grouse, sage grouse, blue or dusky grouse, prairie chicken, wild turkey, waterfowl, birds of prey, and all fur-bearing animals.

(c) The Crow Tribe intends to enact regulations governing the exercise of all off-reservation treaty hunting conducted by Crow tribal members through an amendment to the Crow Fish and Game Code as contained in Title 12 of the Crow Law and Order Code. Such regulations shall, at a minimum, include procedures for issuance of treaty licenses, the establislunent of treaty-hunting seasons, harvest quotas, enforcement procedures including penalties for violations, inter-governmental agreements including cooperative habitat improvement projects, and other conservation-based regulatory measures.

(d) Enrolled members of the Crow Tribe, pursuant to the Fort Laramie Treaties of 1851 and 1868, may take native species of animals, including but not limited to the aforementioned list in Section 1(b), permitted to be taken under Crow tribal law. All animal species federally-listed as endangered or threatened under the Endangered Species Act and all animal species otherwise specifically protected from hunting under federal statutory law shall be honored as protected by the Crow Tribe. Enrolled

members engaged in treaty-hunting shall at all times have a current tribal identification card in their possession. It shall be unlawful for any non-member to accompany a tribal member engaged in off-reservation treaty hunting.

Section 2. Notice to Federal Government. Upon the effective date, a certified copy of this Tribal Resolution shall be immediately provided to the following local and regional federal offices: the United States Attorney for the District of Montana in Billings, the United States Attorney for the District of Wyoming in Cheyenne, the Forest Supervisor for the Bighorn National Forest in Sheridan, the Forest Supervisor for the Custer National Forest in Billings, the Forest Supervisor for the Gallatin National Forest in Bozeman, the Forest Supervisor for the Shoshone National Forest in Cody, the Forest Supervisor for the Lewis and Clark National Forest in Great Falls, the Forest Supervisor for the Black Hills National Forest in Custer, South Dakota, the Superintendent for Yellowstone National Park in Wyoming, the Superintendent for Big Horn Canyon National Recreation Area in Fort Smith, the Director of the Montana-Dakotas State Office of the Bureau of Land Management in Billings, the Director of the Wyoming State Office of the Bureau of Land Management in Cheyenne, and the Mountain-Prairie Regional Director of the Fish and Wildlife Service in Denver. Furthermore, a certified copy of this Tribal Resolution shall be immediately provided to the President of the United States Barack Obama, United States Attorney General Eric Holder, Secretary of the Interior Sally Jewell, and Secretary of the Department of Agriculture Tom Vilsack.

Appendix A

Section 3. Notice to Montana state government. Upon the effective date, a certified copy of this Tribal Resolution shall be immediately provided to the following Montana state government offices: the Office of the Governor, the Attorney General's Office, and the Director of Department of Fish, Wildlife, and Parks in Helena.

Section 4. Notice to Wyoming state government. Upon the effective date, a certified copy of this Tribal Resolution shall be immediately provided to the following Wyoming state government offices: the Office of the Governor, the Attorney General's Office, and the Director of Department of Game and Fish in Cheyenne.

Section 5. Notice to South Dakota state government. Upon the effective date, a certified copy of this Tribal Resolution shall be immediately provided to the following South Dakota state government offices: the Office of the Governor, the Attorney General's Office, and the Director of Department of Game, Fish and Parks in Pierre.

Section 6. Executive Branch to Negotiate. The Executive Branch is authorized to negotiate with any and all federal and state governmental authorities regarding any terms or conditions the Legislature should consider in the adoption of treaty hunting regulations in the Tribal Fish and ~~Game Code~~.

Section 7. Tribal Resolution Not a Limitation of Rights. Nothing contained in this Tribal Resolution shall be considered a limitation on any Crow tribal rights to hunt, fish, or gather pursuant to the 1868 Fort Laramie Treaty or other law.

Section 8. Effective Date. This Act shall become effective immediately upon becoming duly adopted by the Legislature and approved by the Executive Branch Chairman.

APPENDIX B — CROW RESERVATION FISH & GAME CODE, 2005, CROW LAW AND ORDER CODE, TITLE 12 (FROM *WYOMING V. HERRERA*, RECORD ON APPEAL, CT 2014-2687; 2688) (SELECTED EXCERPTS)

TITLE 12

FISH AND GAME CODE

[TABLES INTENTIONALLY OMITTED]

CHAPTER 1 POLICY

12-1-101. *Policy.* It is the policy of the Crow Tribal Council to exercise the inherent sovereignty of the Crow Indian Nation over all land and waters within the exterior boundaries of the Crow Indian Reservation. Henceforth all hunting and fishing within the exterior boundaries will be regulated by the Tribal Council through the Crow Tribal Fish & Game Commission as set forth in this title. Any previous resolution of the Tribal Council to the contrary is hereby rescinded.

12-1-102. *Jurisdiction.* - (1) This code shall govern activities including but not limited to hunting, fishing, trapping, gathering, and recreation. The natural resources affected by these activities belong to the Crow Tribe.

* * *

(39) "WATERFOWL" includes but is not limited to all varieties of Geese, Brant, Swans, Ducks, Rails, coots, and Wilson Snipes.

Appendix B

(40) "WILDLIFE" means any and all forms of birds and mammals including their nest or eggs.

CHAPTER 3 CONSERVATION

12-3-101. *Policy.* It shall be and is hereby established as the policy and intent of the Crow Tribal Fish and Game Commission, as established by the Crow Tribal Council, to provide an adequate and flexible system for the protection and conservation of all forests (whenever they are designated as wildlife habitat), fish and game resources within the Crow Indian Reservation; to provide for the general management and supervision of all wildlife, fishery, and outdoor recreational activities on the Crow Indian Reservation, including but not limited to, the establishment of rules, regulations and ordinances relating to the harvest of Fish and Game on the Crow Indian Reservation, the establishment of prohibited acts and penalties in regard to wildlife, fishery, and outdoor recreational activities on the Crow Indian Reservation.

12-3-102 *Conservation Fund.* (1) The conservation fund shall consist of all monies received from the sale of licenses and permits, the penalties collected by the conservation court, monies received from the sale of confiscated property, donations, and other funds appropriated by the Crow Tribal Council or any other entity for conservation purposes. The custodian of the conservation fund shall make periodic financial report to the Crow Tribal Fish and Game Commission, and shall not disburse monies from the Conservation Fund without a recommendation as provided for herein.

(2) The Crow Tribal Fish & Game Commission shall advise or recommend to the Crow Tribal Council disbursements and expenditures from the conservation fund, provided that in no case shall funds be expended or disbursed for purposes which are not reasonable and necessary to the implementation or operation of the activities governed by this code.

12-3-102 *Crow Tribal Court.*
The Crow Tribal Court shall have jurisdiction over all violations of the Fish and Game Code.

CHAPTER 4 NON-MEMBER LICENSING

12-4-101 *Non-members; Basic Recreation License; Hunting and Fishing Permits.*
The Basic Recreation License is prerequisite to all hunting and fishing permits. The holder of a current Recreation License may engage in recreation activities within the exterior boundaries of the Reservation pursuant to the terms and conditions contained in these regulations.

(1) Fishing Permit: To lawfully fish in a Reservation water body, non-members must possess a valid Recreation License to which is permanently affixed a fishing permit.

(2) Hunting Permit: To lawfully take or hunt Big Game, Small Game, Fur-Bearers, migratory waterfowl, and upland game birds, a non-member must possess a valid Recreation License to which is permanently affixed a hunting permit appropriate to the category of game hunted or trapped.

Appendix B

(3) Trapping Permit: To lawfully trap fur bearers of small game mammals, a non-member must possess a valid Recreation License to which is permanently affixed a trapping permit.

(4) Waterfowl Permit: To lawfully hunt or take migratory waterfowl within the exterior boundaries of the Reservation, a non-member must possess a valid Recreation License to which is permanently affixed a Tribal Waterfowl Permit and Federal Migratory Bird Stamp.

(5) Upland Game Permit: To lawfully hunt or take upland game bird within the exterior boundaries of the Reservation, a person must possess a valid Recreation License to which is permanently affixed a Upland Game Bird Permit.

12-4-102 *Obtaining, validating licenses/permits–non-members.* Permits and licenses can be obtained only through Crow Tribal Fish and Game Commission office during regular hours (Monday - Friday, 8:00 a.m. to 5:00 p.m.) or through any sellers authorized by the Fish and Game Commission.

(1) Only one permit per regulated activity may be obtained by an individual.

* * * *

No. 17-532

IN THE

Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ of Certiorari to the District Court of Wyoming, Sheridan County

BRIEF OF *AMICUS CURIAE* SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The amicus curiae Shoshone-Bannock Tribes ("Tribes") is a federally recognized Indian tribe, 83 Fed. Reg. 4235, 4238 (Jan. 30, 2018), occupying the Fort Hall Reservation in Idaho, pursuant to the Treaty of Fort Bridger, art. 2, July 3, 1868, 15 Stat. 673 ("Fort Bridger Treaty" or "1868 Treaty"), and companion executive orders,[2] and exercising rights to hunt, fish, and gather on unoccupied lands of the United States pursuant to Article 4 of the 1868 Treaty.[3] *See State v. Tinno*, 497 P.2d 1386, 1389-91 (Idaho 1972). The Tribes' interest in this case arises from the reliance that the court below placed on *Ward v. Race Horse*, 163 U.S. 504 (1896), in ruling that Wyoming's statehood extinguished the Crow Tribe's off-reservation treaty

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel for Amicus states no counsel for a party authored this brief in whole or in part, and no person or entity other than Amicus and its counsel made any monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of *amicus curiae* briefs in letters filed with the Clerk.

[2] The Reservation was first set aside by an 1867 Executive Order. Executive Order of President Andrew Johnson (June 14, 1867), *reprinted in* I *Indian Affairs, Law and Treaties* 836-37 (Charles J. Kappler ed., 1904) ("Kappler"). The provisions of the 1868 Treaty promising the Reservation to the Tribes were then implemented by an 1869 Executive Order. Executive Order of President Ulysses Grant (July 30, 1869), *reprinted in* I Kappler at 838-39.

[3] Article 4 provides the Shoshone-Bannock Tribes "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty art. 4.

right.[4] *See* Pet. App. 31-34. *Race Horse* was effectively overruled by this Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-08 (1999), and as the Tribes' off-reservation hunting rights in Wyoming[5] were put at issue in *Race Horse*, the Tribes are keenly interested in the proper application of *Mille Lacs*. The Tribes submit this brief to show that *Race Horse* was overruled in *Mille Lacs*, and that the historical record confirms that *Race Horse* was wrongly decided. First, *Race Horse* did not arise from a conflict between off-reservation treaty rights to hunt and the conservation of natural resources by the State. It instead arose from the murder of Bannock Indians by a posse of non-Indians, led by the local constable, who sought to keep the Indians from hunting in the Jackson Hole country to protect business interests of local hunting guides. As federal officials later found, the non-Indians had "a premeditated and pre-arranged plan to kill some Indians and thus stir up sufficient trouble to subsequently get United States troops into the region and ultimately have the Indians shut out from Jackson Hole. The plan was successfully carried out and the desired results obtained."[6] Treaty rights

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[4] The Crow Tribe's off-reservation rights are set out in Article 4 of the Treaty of May 7, 1868, 15 Stat. 649. Pet. App. 34.

[5] *Race Horse* addressed the effect of Wyoming's admission to statehood on the off-reservation hunting rights held under the Fort Bridger Treaty within the state of Wyoming, *Race Horse*, 163 U.S. at 507 (sole question presented concerns the treaty right to hunt "within the limits of the State of Wyoming"); *id.* at 514 (concluding the treaty right was repealed by the Wyoming admission act "in so far as the lands in [the hunting] districts are now embraced within the limits of the state of Wyoming").

[6] U.S. Dep't of Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* 77 (1895) ("1895

to hunt, fish, and gather off-reservation are not irreconcilable with state sovereignty over natural resources, *Mille Lacs*, 526 U.S. at 204, and the bare resistance to those rights that led to *Race Horse* furnishes no basis for their denial. Second, when the Fort Bridger Treaty is interpreted in conformance with the rules of treaty construction set forth in *Mille Lacs*, 526 U.S. at 196, 200, it is clear that Article 4 of the 1868 Treaty was intended to secure to the Tribes the right to hunt, fish, and gather on unoccupied lands of the United States in Wyoming, as elsewhere, for as long as game is to be found on those lands.

STATEMENT OF FACTS

For generations, the Shoshone and Bannock Indians migrated widely to obtain subsistence resources. *See* William Clark & Meriwether Lewis, *The Journals of Lewis and Clark* 1384 (Bernard DeVoto ed., Amazon Kindle 2016) (entry for Aug. 19, 1805). The Tribes negotiated treaties with the United States throughout the mid-19th century, and their reliance on hunting, fishing, and gathering was well-known to the United States as a result of those negotiations. In the mid-1860s, the United States and the Tribes negotiated a series of treaties securing tribal hunting, fishing, and gathering rights over a large area. In 1863, the United States negotiated three treaties—two of which were ratified—which established a reservation of over 44 million acres for the Eastern Shoshone, *see* Treaty

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ARCIA") (quoting Report of U.S. Att'y for Wyo.). The Annual Reports of the Commissioner of Indian Affairs were reprinted in the Secretary of the Interior's Annual Reports to Congress, which were printed as House Documents in the following year. *See* H.R. Doc. No. 5 (1896) (reprinting 1895 ARCIA). They are also *available at* http://digicoll.library.wisc.edu/cgi-bin/History/History-idx?type=browse&scope=HISTORY.COMM REP.

with the Eastern Shoshoni, art. IV, July 2, 1863, 18 Stat. 685; *United States v. Shoshone Tribe*, 304 U.S. 111, 113 (1938), and recognized the expansive territories of other Shoshone and Bannock Bands, Treaty with the Western Shoshoni, art. V, Oct. 1, 1863, 18 Stat. 689; Treaty of Soda Springs, Oct. 14, 1863 (unratified), *reprinted in* V Kappler at 693. After 1863, Shoshone bands negotiated two other unratified treaties that ceded lands to the United States and reserved tribal fishing rights in the ceded lands. Treaty of Fort Boise, Oct. 10, 1864 (unratified);[7] Caleb Lyon's Bruneau Treaty, Apr. 12, 1866 (unratified).[8] And in 1867, when President Andrew Johnson established the Fort Hall Reservation for the Bannocks and Shoshone by Executive Order, *see* Executive Order of June 14, 1867, the Bannock chiefs informed the United States they would only move there if they could leave it to hunt and fish.[9]

In 1868, the United States and the Tribes negotiated the Fort Bridger Treaty. During the negotiations, the lead U.S. negotiator explained the new reservation would be the Indians' permanent home, but they would have "permission to hunt wherever you can find

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[7] Enclosed with Letter from Caleb Lyon, Governor & ex officio Superintendent of Indian Affairs, Idaho Territory, to Sec'y of Interior (Oct. 20, 1864), *microfilm at* Nat'l Archives & Records Admin. ("NARA"), Microcopy 234, Roll 337.

[8] Enclosed with Letter from Caleb Lyon, Governor & ex officio Superintendent of Indian Affairs, Idaho Territory, to Sec'y of Interior (Apr. 16, 1866), *microfilm at* NARA, Microcopy T-474, Roll 9 ("1866 Lyon Letter").

[9] Letter from D.W. Ballard, Governor & ex officio Superintendent of Indian Affairs, Idaho Territory, to Comm'r of Indian Affairs (June 30, 1867), *microfilm at* NARA, Microcopy 234, Roll 337 ("1867 Ballard Letter").

game." Report from C.C. Augur, Brevet Major-Gen., to President, Indian Peace Comm'n (Oct. 4, 1868), *reprinted in Papers Relating to Talks and Councils Held with the Indians in Dakota and Montana Territories in the Years 1866-1869* 116 (GPO 1910) ("Augur Report"). The Shoshone Chief Washakie responded he wanted a reservation on the Wind River but also "the privilege of going over the mountains to hunt where I please," and Bannock Chief Taghee stated "as far away as Virginia City [Montana] our tribe has roamed. But I want the Porte-Neuf country and the Kamas Plains" for the Bannock Reservation. *Id.* at 117-18. These negotiations resulted in the Treaty of Fort Bridger, in which the Tribes ceded the 1863 Treaty reservation in exchange for new reservations in Wyoming and Idaho, art. 2, while reserving the right, off-reservation, "to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among whites and Indians on the borders of the hunting districts," *id.* art. 4.

SUMMARY OF ARGUMENT

The murder of Bannock Indians, not the killing of elk, led to the *Race Horse* case. On July 15, 1895, a party of Bannock Indians and their families were hunting for subsistence purposes in the area known as the Jackson Hole country, Wyoming when they were surrounded by a posse of settlers led by the local constable. The Indians were disarmed, and marched under guard. When the Indians fled because they believed they were to be killed, the settlers shot at the Indians. Two Indians, an elderly blind man and an infant, were killed as a result of the attack. The settlers sought to keep the Indians from hunting in that area to protect business interests of local hunting guides and initiated

the confrontation to get the Indians' rights before the courts. As the local constable stated: "We knew very well when we started in on this thing that we would bring matters to a head. We knew someone was going to be killed, perhaps some on both sides, and we decided the sooner it was done the better, so that we could get the matter before the courts." 1895 ARCIA at 76. The killers were never prosecuted. Instead, the settlers' opposition to the Indians' rights resulted in the *Race Horse* case being brought.

This history shows "*Race Horse* rested on a false premise" not only because off-reservation treaty rights to hunt, fish, and gather are not irreconcilable with state sovereignty over natural resources, *Mille Lacs*, 526 U.S. at 204, but also as a matter of fact. Resistance to federal rights was the source of the conflict in *Race Horse*, which provides an additional reason for overruling that decision. This Court did so in *Mille Lacs* by reaffirming that to abrogate an Indian treaty right, "[Congress] must clearly express its intent to do so," *Mille Lacs*, 526 U.S. at 202 (citing *United States v. Dion*, 476 U.S. 734, 738-40 (1986)); by holding that a state's admission to the Union on an equal footing does not abrogate treaty rights to hunt, fish, and gather off-reservation because those rights are not irreconcilable with state sovereignty, *Mille Lacs*, 526 U.S. at 203-06; and by making clear that when a treaty "itself defines circumstances under which the rights terminate," and those defined circumstances do not include "when a State was established in the area," the rights are intended to and do survive statehood. *Id.* at 206-07. Finally "[t]reaty rights are not impliedly terminated upon statehood." *Id.* at 207. The "*Race Horse* Court's decision to the contrary" is no longer the law, as it was informed by that Court's conclusion that Indian treaty rights are

inconsistent with state sovereignty and thus could not have been intended to survive statehood. *Id.* at 207-08. Accordingly, the court below erred, and its decision should be reversed.

The *Mille Lacs* Court also made clear that "we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them," *id.* at 196 (citations omitted), and that "Indian treaties are to be interpreted liberally in favor of the Indians, and . . . any ambiguities are to be resolved in their favor." *Id.* at 200 (citations omitted). When Article 4 of the 1868 Treaty is so interpreted, it confirms that the Tribes retain their right to hunt, fish, and gather on unoccupied lands of the United States in Wyoming, as they do in Idaho under the ruling of the Idaho Supreme Court in *Tinno*.[10]

ARGUMENT

I. *RACE HORSE* AROSE FROM THE MURDER OF BANNOCK INDIANS BY SETTLERS, NOT FROM A CONFLICT BETWEEN THE INDIANS' TREATY RIGHTS AND STATE CONSERVATION INTERESTS.

Race Horse did not arise from the killing of elk by Indians; but from the actions of settlers who got away with murder. Non-Indian settlers determined to deny the Indians their federal rights killed Bannock Indians to get their opposition to those rights to

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[10] The Tribes also join Petitioner's argument that *Mille Lacs* overruled *Race Horse*, Pet. Br. at 23-32, and his argument that the creation of the Big Horn National Forest did not terminate Treaty off-reservation hunting rights, *id.* at 32-40, as well as the argument of Amici Curiae Natural Resource Law Professors on the latter issue.

court. Thus, "*Race Horse* rested on a false premise" not only because off-reservation treaty rights are not irreconcilable with state sovereignty over natural resources as a matter of law, *Mille Lacs*, 526 U.S. at 204, but also as a matter of fact. Resistance to federal rights does not justify their denial, which provides an additional reason for rejecting *Race Horse*. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 694-96 & n.36 (1979) (federal court has power to order remedial action necessary to protect treaty fishing rights); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

The facts that led to the *Race Horse* case, as shown by the federal government's investigation of the incident, are as follows.

A. The Murders

On July 17, 1895, Governor Richards of Wyoming informed the Interior Department that nine Bannock Indians from Fort Hall had been arrested for illegally killing game, one had been killed, and the others had escaped. 1895 ARCIA at 63 (quoting Telegram from William Richards, Governor, Idaho Territory, to Dep't of Interior (Jul. 17, 1895) (quoting Telegram from Frank H. Rhodes, Justice of Peace, et al., to William Richards, Governor, Idaho Territory (n.d.))). The same day, the Commissioner of Indian Affairs directed the Fort Hall and Shoshone Indian agents to go to the scene to prevent further conflict and to have the Indians return to their respective Reservations. *Id.* at 63-64. The Fort Hall agent reported that the Sheriff who investigated the conflict had said the Indians had not molested the settlers. *Id.* at 64.

The Commissioner subsequently received several official reports on the incident. The Indian agents for the Fort Hall Agency reported that the Bannock and Shoshone Indians hunted "for sustenance," *id.* at 66 (quoting Report of Captain Van Orsdale, Acting Indian Agent (July 20, 1895)), had been hunting in the Jackson Hole country for many years, and that objections had arisen "only since the business of guiding tourists in search of big game has become so remunerative." *Id.* at 67 (quoting Report of Thomas Teter, Indian Agent, Fort Hall Agency (Jul. 24, 1895)). Agent Teter also reported the Indian account of the incident, as follows: A hunting party of nine Indians and their families were encamped on a stream in Uinta County when they were surrounded by twenty-seven armed settlers. The Indians were disarmed, the men were placed in one group, their families in another, both under guard. "The Indians, roughly treated, were driven throughout the day they knew not where, and as evening closed in the party approached a dense wood, upon which the leader of the settlers spoke to his men, and they examined their arms, loading all empty chambers." *Id.* at 68 (quoting Report of Thomas Teter, Indian Agent, Fort Hall Agency (Aug. 7, 1895)). The Indians, believing they were to be killed, "made a break for liberty; whereupon the settlers without warning opened fire, the Indians seeing two of their number drop from their horses." *Id.* The following morning, the Indians gathered together and found they were missing two men and two infants. They revisited the scene, but could not find the missing persons or their belongings. They then returned to the Reservation. *Id.* One of the men believed to have been killed had been found. "He had been shot through the body from the back" and had "subsist[ed] for seventeen days upon the food which he had in his wallet at the

time he was shot." *Id.* The body of another Indian, who had also been shot in the back, was later discovered and buried by Indian scouts. One of the two infants was found alive, and the other, only six months old, was not found and was presumed to have died. *Id.*

The Commissioner concluded that the Bannocks "have, in the opinion of this office, been made the victims of a planned Indian outbreak by the lawless whites infesting the Jacksons Hole country with the idea of causing their extermination or their removal from that neighborhood." *Id.* at 70. The Commissioner had referred the incident to the Department of Justice, and reported that the Attorney General had responded he was not aware of any law under which the Department of Justice could assist in "punishing, civilly or criminally, the persons who have done them injury, even the murderers." *Id.* at 74-75. On August 30, the Acting Attorney General restated this conclusion. *Id.* at 75.

B. The Conspiracy

The Acting Attorney General also provided to the Commissioner the United States Attorney's report on the incident. The United States Attorney reported that professional guides viewed Indian hunting in the Jackson Hole country as a threat to their businesses. They "decided at the close of last season to keep the Indians out of the region this year, and the events of this summer are the results of carefully prepared plans." *Id.* at 76. "Constable Manning said: 'We knew very well when we started in on this thing that we would bring matters to a head. We knew some one was going to be killed, perhaps some on both sides, and we decided the sooner it was done the better, so that we could get the matter before the courts.'" *Id.* The

United States Attorney found that the agreed-upon plan was executed as follows:

> Constable Manning and 26 deputies surrounded a camp of 10 bucks and 13 squaws at night, and early in the morning with guns leveled at the Indians made the arrest, the Indians offering no resistance. The arrest was made on Fall River, 55 miles from Marysvale. The warrant was for Bannock and Shoshone Indians, the names and number of the Indians to be arrested not being stated. After the arrest was made, the arms, meat, and other articles in the possession of the Indians were taken from them. Constable Manning also took their passes, ration checks, etc. These papers gave the names and residences of most of the Indians. From an interview with Nemits, an Indian boy, who was one of the party of Indians arrested and shot, and from interviews with several of Mr. Manning's posse, I learned that the constable and his men told the Indians some of them would be hung and some would be sent to jail and that this was believed by the Indians. The constable also said in the hearing of the Indians, some of whom understood English, that if the Indians attempted to escape the men should shoot their horses.
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> They believed the threats of being sent to jail and of being hung were true, and they saw no trick in Manning's instructions, given in their hearing, to shoot their horses if they tried to get away.

* * *

> From Mr. Manning I learned that none of the horses of the escaping party of Indians were shot, notwithstanding his order, but that at least six Indians were hit by bullets. Of these, Timeha, an old man, was killed; Nimits, a boy of about 20, was wounded so that he could not escape, and the others got away. Constable Manning said to me: "The old Indian was killed about 200 yards from the trail. He was shot in the back and bled to death. He would have been acquitted had he come in and stood his trial, for he was an old man, almost blind, and his gun was not fit to kill anything."
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> When the body of this old, sick, blind man was found after lying unburied in the woods for about twenty days it was found he had been shot four times in the back. The boy, Nemits, who was wounded, was shot through the body and arm. He was left on the ground where the shooting occurred, and remained there, living on some dried meat for ten days. He crawled for three nights to reach a ranch of a man friendly to Indians, and was seventeen days without medical attendance.

Id. at 76-77. The United States Attorney concluded as follows:

> The whole affair was, I believe, a premeditated and prearranged plan to kill some Indians and thus stir up sufficient trouble to subsequently get United States troops into the region and ultimately have the Indians shut out from Jacksons Hole. The plan was

> successfully carried out and the desired results obtained.

Id. at 77.

The Commissioner subsequently directed Agent Teter to obtain evidence of the incident at Jackson Hole. *Id.* at 78 (quoting 1868 Treaty, art. 1 (authorizing the arrest and punishment of "bad men among the whites" for "any wrong upon the person or property of the Indians" "upon proof made to the agent and forwarded to the Commissioner.")). That evidence was provided in two affidavits. The first recounted that the Wyoming Governor had agreed to protect the justice of the peace who issued the arrest warrants for Bannocks hunting in Wyoming if trouble with the United States arose from the Bannocks' arrest. *Id.* at 78-79 (quoting Aff. of Ravenal Macbeth (Sept. 3, 1895)). The second affidavit recited the facts of the incident. *Id.* at 79 (quoting Aff. of Ben Senowin (Sept. 1, 1895)). Agent Teter also furnished the names of the men who committed the assault. *Id.* at 80. The Commissioner requested the United States take action under Article 1 of the 1868 Treaty to arrest and punish the offenders under federal law. *Id.*

The Secretary of the Interior reported on this matter to the President. *See Annual Report of the Secretary of the Interior* (1895), *reprinted in Message from the President to the Two Houses of Congress* 677 (1896).[11] His report recognized the Tribes' right to hunt on unoccupied lands of the United States under Article 4 of the 1868 Treaty, stated that they had for many years gone "to the Jackson's Hole country to hunt game for subsistence," *id.* at 686-87, and summarized

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[11] *Available at* https://babel.hathitrust.org/cgi/pt?id=mdp.39015087536861;view=2up;seq=6.

the facts of the incident, *id.* 687-88. The Secretary further reported "the Department of Justice had 'again taken under consideration the question of prosecuting the whites who committed the outrages upon the Indians in the Jacksons Hole country,' and the United States attorney for Wyoming had been instructed to indict the parties and prosecute the case with vigor." *Id.* at 688 (quoting Message from Att'y Gen. (Sept. 24, 1895)).

The Secretary also said the Department had instructed Province McCormick, an Inspector for the United States Indian Service, to meet with the Governor of Wyoming. If the Governor would not agree to recognize the Indians' treaty rights, the Inspector was to propose that the Indians' rights be determined by having an Indian arrested and charged in state court, after which the United States Attorney would seek the Indian's release by writ of habeas corpus in Wyoming federal court. *Id.* at 688-89. If the Governor agreed to that proposal, the Inspector was to "secure the arrest of an Indian through the Fort Hall agent," notify the Department, and call a council with the Indians at Fort Hall to explain the action taken by the Department. The Secretary further reported that: the Governor had agreed to the proposal; two Indians were arrested and taken to Evanston, Wyoming, "under the charge of the Indian agent" and an interpreter;[12] a council with the Indians was held and "they

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[12] The Indians were not made aware of their arrest. Agent Teter accompanied Race Horse and another Bannock Indian to Evanston and reported "the Indians, though in the custody of the Sheriff, are not aware of the fact of their arrest and, it is my intention to keep them in ignorance, owing to the bad effect it would have upon the Indians on the reservation." Letter from Thomas Teter, Indian Agent, Fort Hall Agency, to Comm'r of Indian Affairs (Oct. 10, 1895), *available at* NARA, Record Grp.

all agreed to rely implicitly upon the Government to redress their wrongs—pledging themselves to abstain from any attempts at revenge for the outrages committed upon their people;"[13] the Indians' release was sought on writs of habeas corpus; and the federal court had "held the laws of Wyoming invalid against the Indians' treaty." *Id.* at 689.

In his 1896 report to the President, the Secretary described this Court's decision in *Race Horse*, and reported the Attorney General had determined "there was no statute of the United States under which any assistance could be afforded" to address the killing of Bannock Indians hunting in the Jackson Hole country. *Annual Report of the Secretary of the Interior* (1896), *reprinted in Message from the President to the Two Houses of Congress* 829 (1897).[14] No state or

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75, Entry 91, Letters Received, Box 1248. It is unknown how Agent Teter accomplished this. The certified copies of the jail records do not indicate Race Horse or any other Indians were incarcerated in that jail at the relevant times. *See Jail Record of Uinta County Wyoming* 58-61 (1895), enclosed with Letter from Doug Matthews, Sheriff, Uinta Cnty. (July 2, 2018).

[13] The Shoshone and Bannock Indians were not told that would be the federal government's only response to the killings. Furthermore, Inspector McCormick told the Secretary while he was confident the Treaty rights would be upheld by the courts, he was equally confident the non-Indians in the region would never abide by a court ruling because they were lawless and reckless and of the view that "*shooting down defenseless Indians is a greater source of revenue in the end than the tilling of the soil. They realize that it is not a crime in Wyoming to shoot an Indian.*" Report from Province McCormick, Indian Inspector, to Sec'y of Interior (Oct. 6, 1895), *available at* NARA, Record Grp. 75, Entry 90, Letters Received, Box 1249 (emphasis added). Inspector McCormick's last observation proved to be correct.

[14] *Available at* https://babel.hathitrust.org/cgi/pt?id=mdp.39015087536853;view=1up;seq=10.

federal prosecution was ever brought for the murder of the Indians, as the United States Attorney had feared would be the case.[15]

In sum, *Race Horse* was premised on resistance to Indian rights, not a conflict over the conservation of natural resources.

II. THE *MILLE LACS* DECISION ESTABLISHES *RACE HORSE* HAS NO CONTINUING LEGAL FORCE.

Mille Lacs overruled *Race Horse* for the following reasons. First, as the *Mille Lacs* Court made clear, "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202 (citing *Dion*, 476 U.S. at 738-40; *Passenger Fishing Vessel*, 443 U.S. at 690; *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968)). "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve conflict by abrogating the treaty.'" *Id.* (quoting *Dion*, 476 U.S. at 740). The Wyoming Admission Act provides no such clear evidence because it simply provides "the State of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects

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[15] In August of 1895, the United States Attorney had stated "there are no officials in Jacksons Hole—county, State, or national—who would hold any of Manning's posse for trial. Either the anti-Indian proclivities of these officials or the fear of opposing the dominating sentiment of the community on this question would lead them to discharge all of these men should they be brought before them for a hearing." 1895 ARCIA at 77.

whatever; . . ." Act of July 10, 1890, ch. 664, 26 Stat. 222.

Second, a state's admission to the Union on an equal footing does not extinguish treaty rights to hunt, fish, and gather off-reservation because Indian treaty rights can "co-exist with state management of natural resources," *Mille Lacs*, 526 U.S. at 203-05. The States' authority over natural resources within their borders "is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making," *id.* (citing U.S. Const. art. VI, cl. 2; *Missouri v. Holland*, 252 U.S. 416 (1920); *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *United States v. Winans*, 198 U.S. 371, 382-84 (1905); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876); *Menominee Tribe*, 391 U.S. at 411 n.12)). Under settled principles the "state [has] authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation," *id.* at 205 (citing *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 (1968); *Passenger Fishing Vessel*, 443 U.S. at 682; *Antoine v. Washington*, 420 U.S. 194, 207-08 (1975)).

Third, the "alternative holding" in *Race Horse* that "[t]he treaty rights at issue were not intended to survive Wyoming's statehood," *Mille Lacs*, 526 U.S. at 206, is no longer the law because *Mille Lacs* makes clear that a treaty right survives statehood unless the treaty states in clear terms that the right terminates when a state is established. *Id.* at 206-07. As the Court observed, the 1868 Treaty "contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States." *Id.* at 207. The 1868 Treaty, like the

1837 Chippewa Treaty at issue in *Mille Lacs*, contains "no suggestion" that the Treaty right "should end when a State was established in the area." *Id.* Indeed, by promising that the Tribes "shall have the right to hunt" as long as the specified conditions continue, the possibility of an earlier termination upon statehood is foreclosed.

Fourth, "there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* upon statehood," *id.* (emphasis in original) (citations omitted). Accordingly, *Race Horse*'s determination that the rights held under Article 4 of the 1868 Treaty were impliedly repealed is no longer the law. Finally, "[t]he *Race Horse* Court's decision to the contrary—that Indian treaty rights were impliedly repealed by Wyoming's statehood Act—was informed by that Court's conclusion that the Indian treaty rights were inconsistent with state sovereignty over natural resources and thus that Congress (the Senate) could not have intended the rights to survive statehood. But as we described above, Indian treaty-based usufructuary rights are not inconsistent with state sovereignty over natural resources." *Id.* at 207-08.

For all of these reasons, *Race Horse* has been overruled.

III. APPLYING THE RULES OF TREATY CONSTRUCTION SET FORTH IN *MILLE LACS* CONFIRMS THAT THE TRIBES RETAIN THEIR RIGHTS UNDER ARTICLE 4 OF THE 1868 TREATY.

In considering whether a treaty right has been abrogated, the *Mille Lacs* Court emphasized that "an examination of the historical record provides insight

into how the parties to the Treaty understood the terms of the agreement," which is important "because we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Id.* at 196 (citing *Passenger Fishing Vessel*, 443 U.S. at 675-76; *Winans*, 198 U.S. at 380-81). The Court also declared that "Indian treaties are to be interpreted liberally in favor of the Indians, and . . . any ambiguities are to be resolved in their favor." *Id.* at 200 (citations omitted). Application of those rules to the 1868 Treaty confirms that the Tribes have the right to hunt and fish on the "unoccupied lands of the United States" under Article 4 of that Treaty, as the Idaho Supreme Court correctly held in *Tinno*.[16]

The historical record leading up to the 1868 Treaty shows the United States was well aware the Shoshone and Bannocks needed to hunt, fish, and gather to survive, and understood those rights had to be promised to the Indians to obtain a cession of their lands; and that the Indians understood treaty negotiations could properly include such rights. Two early unratified

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[16] In *Tinno*, the State appealed from the district court's ruling that the Treaty right exempted the defendant from State regulation and that he was therefore not guilty. *Id.*, 497 P.2d at 1387-88. The Idaho Supreme Court initially held the appeal must be dismissed because it was not authorized by I.C. § 19-2804, but went on to "consider the matter substantively" because of importance of the question presented, the uniqueness of the record made in the case, and the likelihood of the dispute arising again. *Tinno*, 497 P.2d at 1388. The Idaho Supreme Court has since held that *Tinno* was properly considered by the Court under Article 5, § 9 of the Idaho Constitution, which "defines the appellate jurisdiction of this Court," and "gives this Court power to review 'any decision' of the district courts." *State v. Lewis*, 536 P.2d 738, 741 (Idaho 1975); *State v. Holtry*, 559 P.2d 756 (Idaho 1977). *Tinno* was also reaffirmed by the Idaho Supreme Court in *State v. Cutler*, 708 P.2d 853, 857 (Idaho 1985).

treaties with the Tribes expressly reserved tribal hunting, fishing, and gathering rights. The Treaty of Fort Boise of October 10, 1864 reserved the right to fish in the area ceded, and Caleb Lyon's Bruneau Treaty of April 12, 1866 reserved both the right to fish at "accustomed grounds and stations" and "the privilege of hunting and gathering roots on open and unclaimed lands."[17] In the negotiation of the latter treaty, the federal negotiator assured the Indians they could reserve "this [Bruneau] valley for yourselves, and as much more as is necessary for hunting and fishing," and in response, Tcho-wom-ba-ca, or "Biting Bear," explained "[s]kins are our clothes. Deer, [e]lk, [f]ish, [a]ntelope, [r]oots and seeds [are] our food." 1866 Lyon Letter.

The importance to the Tribes of continuing to hunt, fish, and gather even after they moved to a reservation was made clear to federal officials after the President issued an executive order to establish the Fort Hall Reservation in 1867,[18] and the federal government sought the agreement of the Shoshones and Bannocks to move to that reservation. In those negotiations, the Idaho Territorial Governor Ballard inquired "Would [you] like to live on a reservation? Provided we build you houses, teach you [how] to farm, [et]c?" 1867 Ballard Letter. The Bannock headmen responded, "[w]e want to hunt buffalo and to fish," and were only willing to move to a reservation if they were able to leave the reservation to hunt and fish. *Id.*

In the 1868 Treaty, the Shoshone and Bannock ceded lands reserved to them by prior treaty, *see*

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[17] *See supra* nn.7-8.

[18] Executive Order of June 14, 1867, *reprinted in* I Kappler at 836-37.

Shoshone Tribe, 304 U.S. at 113, agreed to move to reservations, and secured the off-reservation hunting, fishing, and gathering rights they had long sought and the United States had long understood were essential to their subsistence. At the treaty negotiations, General Augur explained there were "a great many white men in your country," and their numbers would increase when the railroad was completed. In response to those changes, the government sought to acquire Tribal lands and move the Indians to a reservation. But they could hunt wherever there was game. Augur Report at 116. "Upon this reservation he wishes you to go with all your people as soon as possible, and to make it your permanent home, *but with permission to hunt wherever you can find game.*" *Id.* (emphasis added). Chief Washakie responded, "I want for my home the valley of Wind River and lands on its tributaries as far east as the Popo-agie, and I want the privilege of going over the mountains to hunt where I please." *Id.* at 117. Bannock Chief Taghee stated "as far away as Virginia City [Montana] our tribe has roamed. But I want the Porte-Neuf country and the Kamas Plains" for the Bannock reservation. *Id.* at 118. These terms were agreed to in the 1868 Treaty, under which the Shoshone and the Bannock ceded the Reservation that had earlier been set aside for them, 1868 Treaty art. 1, Reservations were provided for them, *id.*, and they reserved usufructuary rights on "unoccupied lands of the United States." *Id.* art. 4. Nothing was said that would even suggest those rights would last only until a state was established in the area.

In upholding the rights held by the Tribes under the 1868 Treaty,[19] the Idaho Supreme Court in *Tinno*

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[19] The United States filed an amicus brief in *Tinno*, in which it maintained its position the Tribes hold the right to hunt on

recognized the importance of the historical record to the interpretation of the treaty:

> We are of the opinion that the special consideration which is to be accorded the Fort Bridger Treaty fishing right must focus on the historical reason for the treaty fishing right. The gathering of food from open lands and streams constituted both the means of economic subsistence and the foundation of a native culture. Reservation of the right to gather food in this fashion protected the Indians' right to maintain essential elements of their way of life, as a complement to the life defined by the permanent homes, allotted farm lands, compulsory education, technical assistance and pecuniary rewards offered in the treaty.

Tinno, 497 P.2d at 1393.[20] The court also recognized its obligation to interpret the 1868 Treaty as the Indians understood it. *Id.* at 1391 (citations omit-

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unoccupied lands of the United States under the Fort Bridger Treaty. Br. of United States, *Amicus Curiae*, *State v. Tinno*, 497 P.2d 1386 (Idaho 1972) (No. 10737).

[20] The Ninth Circuit recognized the Tribes' rights in *Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 452 F.3d 1278 (9th Cir. 1994), in which the Tribes alleged state officials had violated their Treaty rights. The court held that "[p]ursuant to Article 4 of the [1868 Treaty], the Tribes retain the right to 'hunt on unoccupied lands of the United States.'" *Id.* at 1280. Considering whether one of the defendants was entitled to qualified immunity, the court further held, citing *Tinno*, that "[t]he Tribes' right is and was clearly established," and that "[f]or more than twenty years, the Fort Bridger Treaty has been interpreted to reserve to the Tribes the right to fish on unoccupied lands of the United States." *Id.* at 1286.

ted).[21] Addressing the meaning of the treaty term "to hunt," the *Tinno* court found the Shoshone and Bannock languages "did not employ separate verbs to distinguish between hunting and fishing but rather used a general term for hunting and coupled this with the noun corresponding to the object (either animal or vegetable) sought." *Id.* at 1389. Accordingly, the verb "to hunt" would have been understood to mean "to obtain wild food," and "the English terminology when translated to [the Shoshone and Bannock] leaders . . . would have been understood to encompass both 'fishing' and 'hunting' for game." *Id.* The court also found that "[a]nnual treks to salmon spawning beds in the region which includes the Yankee Fork [of the Salmon River, where the alleged offense occurred] were part of the economic way of life of these Indians since earliest times," *id.* at 1390, and relied on General Augur's report, which showed "hunting and fishing" was discussed at the negotiations, and "the true concern of the tribal negotiators, recognized by the government agents, [was] that the signatory Indians were facing a major change in their way of life and that their traditional food gathering would have to be insured in the future," *id.* at 1389. The court concluded "[t]he history of the Indians, the tenor of the treaty, and the understanding of the treaty by the parties, dictate that the words 'to hunt' be not so delimited as to exclude the right 'to fish.'" *Id.* at 1390 (quoting district court ruling).

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[21] That is especially important here, as "[w]hen the treaty of 1868 was made, the tribe consisted of full-blood blanket Indians, unable to read, write, or speak English." *Shoshone Tribe*, 304 U.S. at 114. The Indian understanding of the treaty was based on their own languages, and the terms of the "treaty was interpreted to them, article by article." Augur Report at 118.

The *Tinno* court then considered whether the place where the fish were taken, which was the Yankee Fork of the Salmon River within the Challis National Forest in Custer County, Idaho, *id.* at 1390-91, was subject to the treaty right. The court emphasized this issue was to be resolved by applying the rules of treaty interpretation, *id.* at 1390 (citing *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970)), "keeping in mind the probable understanding of the Indians." *Id.* (citing *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919)). The court found it difficult to "to place a neat and technical geographical construction on [the 1868 Treaty]," *id.* at 1391, noting the 1868 Treaty did not describe the ceded lands, and Brevet Major-General Augur's notes "refer[red] to vast areas of Idaho and surrounding states," *id.* at 1390-91. Accordingly, the court relied primarily on the historical record and the Indian understanding of the treaty. The court found the "signatory Indians had roamed at will and essentially in peace among themselves," and "[t]hey did not in a strict sense occupy the land they roamed; they harvested game, fish, and berries, camas roots, and other natural foods and moved about with the seasonal changes." *Id.* at 1391. Relying on these findings, the court concluded "[i]n agreeing to settle on a permanent basis they still were expecting to harvest food on the unsettled lands as a means of subsistence and as an integral part of their way of life." *Id.*

Furthermore, the court found Article 4 of the 1868 Treaty "refers to the 'unoccupied lands of the United States' and not to 'ceded' lands," and the parties had stipulated the location on the Yankee Fork of the Salmon River where the fishing occurred was within the Challis National Forest and was unoccupied land of the United States. *Id.* Additionally, the record showed the Indians used the Salmon River drainage

for subsistence purposes, took salmon by spear at the spawning beds, and customarily hunted and fished at the Yankee Fork locale. *Id.* On this basis, the court found the area to be covered by the Treaty. *Id.* In so holding, the court relied on the rules of treaty construction, ruling "we must attempt to give effect to the terms of the treaty as those terms were understood by the Indian representatives." *Id.* (citations omitted).

The court then considered the State's power to regulate the Indians' exercise of the 1868 Treaty right. The court began by recognizing the inherent right of the State to regulate the taking of fish and game, *id.* (citing *Geer v. Connecticut*, 161 U.S. 519 (1896)), and its right to regulate Indians in the exercise of off-reservation treaty rights where reasonably necessary to preserve the fishery. *Id.* (citing *Tulee v. Washington*, 315 U.S. 681 (1942); *Puyallup Tribe*, 391 U.S. 392; *State v. McCoy*, 387 P.2d 942 (Wash. 1963)). The court acknowledged the 1868 Treaty had been at issue in *Race Horse*, but found "*Race Horse* and the theory it posited have been entirely discredited by the Supreme Court in *Winans* and *Tulee*, *supra*, and require no further discussion." *Id.* at 1392 n.6.[22] Addressing the

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[22] That issue had earlier been considered by the Idaho Supreme Court in *State v. Arthur*, which expressly rejected the argument that Idaho's Admission to the Union extinguished pre-existing treaty rights, finding subsequent decisions of the Supreme Court had rejected the holding of *Race Horse*. *See Arthur*, 261 P.2d at 139-40. The *Arthur* Court further held neither the Idaho Admission Act nor the Idaho Constitution were intended to abrogate treaty rights; to the contrary, the Idaho Constitution recognizes rights held under treaties entered into prior to statehood. *Id.* at 137-38. Accordingly, Idaho's admission to the Union did not abrogate pre-existing treaty rights, and the recognition of these rights does not violate the State's admission to the Union on an equal footing. *Id.* at 138.

State's power to regulate Treaty fishing under the 1868 Treaty, the court held "spearing a chinook salmon in the Yankee Fork River, certainly cannot be regulated by the state unless it clearly proves regulation of the treaty Indians' fishing in question to be necessary for preservation of the fishery. To require less of the state would emasculate the treaty rights and violate the 'supremacy clause.'" *Id.* at 1393. The court then determined the State had failed to show its regulations were reasonable and necessary for the preservation of the fishery. *Id.* at 1392.

In sum, *Mille Lacs* establishes that *Race Horse* is no longer the law, as the *Tinno* court had earlier concluded, and "'the history of the [1868 T]reaty, the negotiations, and the practical construction adopted by the parties,'" *Mille Lacs*, 526 U.S. at 196 (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)), demonstrates that under Article 4 of the Fort Bridger Treaty, the Tribes have the right to hunt and fish on the "unoccupied lands of the United States," *Tinno*, 497 P.2d at 1389-91.

IV. THE TRIBES EXERCISE CO-MANAGEMENT OF THEIR OFF-RESERVATION TREATY HUNTING AND FISHING RIGHTS.

Today the Tribes, under their own regulations and in cooperation with States and the federal government, ensure that off-reservation treaty rights are exercised consistent with the protection of natural resources. *See Mille Lacs*, 526 U.S. at 204. The Tribes regulate their members' treaty hunting off-reservation by law, *see* Tribal Law & Order Code ch. XVII § 4, and annual regulations, *see* Shoshone-Bannock Tribes Fish & Game Comm'n, *2018-2019 Shoshone-Bannock Tribes Big Game Hunting Regulations* (2018). These define what animals may be hunted off-reservation,

id. pt. 2.2, the location, *id.* pt. 2.3, times, and methods of hunting allowed, *id.* §§ VIII-IX, and seasons for each species, *id.* § X. Tribal hunters must obtain species-specific hunting tags, *id.* § XIII, and report the taking of certain species, *id.* pts. 10.1-10.2.

The Tribes also cooperate with state and federal agencies to implement off-reservation conservation programs. These collaborative agreements protect wildlife habitat, thereby supporting fish and game for both Indians and non-Indians alike. For instance, the Tribes have agreements with the U.S. Fish and Wildlife Service that permit a limited ceremonial bison hunt on the National Elk Refuge, under the terms of a special use permit and tribal regulations. Memo. of Agreement between Nat'l Elk Refuge & Shoshone-Bannock Tribes § VIII(B), (E) (2017). The Tribes, the State of Idaho, and the Bonneville Power Administration ("BPA") are parties to memorandums of agreement implementing the Southern Idaho Wildlife Mitigation Agreement ("SIWMA"), under which the State and the Tribes purchase land to replace the acreage adversely impacted by federal hydropower projects in southern Idaho. Under this agreement, BPA provides funding that the Tribes use to purchase and preserve wildlife habitat in southern Idaho, and the Tribes then develop Management Plans for the land that regulate grazing, road closures, access, and "other management practices designed to protect wildlife and their habitats . . . ." SIWMA, BPA & Shoshone-Bannock Tribes §§ 1-4 (1997). The Tribes reserve their treaty rights on the land and the right to put the land into trust. *Id.* § 10. The Tribes and Idaho also allocate

responsibility to purchase the remaining SIWMA mitigation acreage.[23]

Additionally, the Tribes are party to the Columbia Basin Fish Accords, a partnership between tribes, States, and federal agencies to mitigate the effect of dams on fish in the Columbia River basin, including stocks that the Tribes fish in the exercise of their off-reservation treaty rights. *See* BPA, Adm'r's Record of Decision, 2008 Columbia Basin Fish Accords Memo. of Agreement with Shoshone-Bannock Tribes 1-2 (Nov. 2008). Under the Accords, the parties jointly implement projects to protect anadromous salmon, resident trout, and other wildlife that are affected by federal dam projects. *Id.* at 4.

These regulatory measures confirm that the Tribes' Treaty rights are reconcilable with State conservation interests.

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[23] *See* BPA, Adm'r's Record of Decision & Resp. to Comments, S. Idaho Wildlife Mitigation Memo. of Agreement 2 (2014), *available at* https://www.bpa.gov/news/pubs/RecordsofDecision/rod-20140923-Southern-Idaho-Wildlife-Mitigation-Memorandum-of-Agreement.pdf.

CONCLUSION

The judgment of the Wyoming district court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On a Writ of Certiorari to the District Court of Wyoming, Sheridan County

BRIEF OF *AMICI CURIAE* SOUTHERN UTE INDIAN TRIBE AND UTE MOUNTAIN UTE TRIBE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici Southern Ute Indian Tribe and Ute Mountain Ute Tribe are federally recognized Indian Tribes that ceded a large portion of their common treaty lands in Colorado to the United States ("the Brunot Cession"), under an agreement that expressly confirmed their right "to hunt upon said [ceded] lands so long as the game lasts and the Indians are at peace with white people." Eleven months following Congress' ratification of the Brunot Cession agreement, Congress passed the act enabling Colorado's admission as a State "upon an equal footing with the original States in all respects whatsoever . . . ." Subsequently, Congress withdrew and reserved for national forest purposes certain lands in Colorado, including portions of the ceded area. *Amici* have a substantial interest in confirming that neither statehood nor the creation of national forests implicitly abrogated the hunting rights expressly acknowledged by the United States in securing the cession of those Indian treaty lands.

Further, despite episodes of disagreement, *amici* and the State of Colorado have worked together to avoid disputes and to manage cooperatively the hunting of deer, elk, and other game that occupy the ceded area so that "the game lasts" for the mutual benefit of non-Indian and Ute tribal hunters. Off-reservation hunting rights can and do exist compatibly with State interests. In fact, acknowledgement of off-reservation tribal hunting rights can be an important

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel made a monetary contribution to fund the preparation or submission of this brief. Prior to the filing of this brief, counsel of record for all parties provided their written blanket consent to the filing of briefs *amici curiae*.

step in cooperative State-Tribe management of game, both on and off of Indian reservations.

SUMMARY OF ARGUMENT

For the reasons set forth in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-08 (1999), statehood is not an unspoken condition that implicitly terminated tribal off-reservation hunting rights. The absence of such abrogation language in Indian treaties and cession agreements confirming hunting rights, and the canons of construction that favor Native American beneficiaries of such instruments, weigh heavily against automatic termination of off-reservation hunting rights via statehood. Certainly, the government's negotiators did not indicate that the promises on which Tribes relied for their future sustenance and survival in ceding vast areas of treaty lands would dissolve upon statehood.

In ratifying cession agreements, Congress did not add language or otherwise indicate that the very off-reservation hunting rights being approved would terminate upon passage of legislation enabling statehood. The temporal juxtaposition of congressional ratification of the Brunot Agreement and Colorado's statehood illustrates the incongruity of the statehood-abrogation equation advanced by the State of Wyoming in this case. The Court should not view Congress' silence as to the effect of statehood on tribal off-reservation hunting rights as ending those rights under the equal footing doctrine or related theories.

Nor should the Court equate the creation of national forests with terminating tribal off-reservation hunting rights. The purposes of withdrawal and reservation of national forests do not conflict with the exercise of off-reservation tribal hunting rights in national forests.

Congress has, in fact, demonstrated the compatibility of national forest existence and the more-encompassing status of "Indian country" by statutorily confirming Indian reservation boundaries that include national forest lands. In 1984, for example, Congress included portions of the San Juan National Forest in describing the boundaries of the Southern Ute Indian Reservation in southwest Colorado. *See* Act of May 21, 1984, Pub. L. No. 98-290, § 3, 98 Stat. 201, 202.

Provisions of agreements with Indian Tribes that terminate the exercise of off-reservation hunting rights upon such land becoming occupied were intended to minimize the potential for conflicts with settlers. Treating national forest establishment as occupancy—a limitation intended for conflict-avoidance purposes—grossly reduces the scope of hunting rights to be exercised under applicable Indian treaties and cession agreements in ways not contemplated by Congress or by the tribal parties.

Decades ago, *amici*, Colorado's two Ute Tribes, experienced conflict with the State of Colorado in the exercise of their hunting rights, both on and off-reservation, disputes similar in many respects to the current conflict between members of the Crow Tribe and the State of Wyoming. In resolving those disagreements, Colorado's Ute Tribes and the State of Colorado entered into separate memoranda of understanding that recognize tribal off-reservation hunting rights in the Brunot Cession area. Under those agreements, each Tribe regulates the issuance of hunting permits for elk and deer to tribal hunters in the Brunot Cession area. The frequent exchange of information between *amici* and Colorado's Parks and Wildlife Division about the harvesting of such game and the management of other species ensures that hunting will be

available for tribal and non-tribal hunters now and into the distant future. The confirmation of *amici's* off-reservation hunting rights did not adversely affect game management, and may, in fact, have fostered meaningful coordination and cooperation between the State of Colorado and the *amici* Tribes. Similarly, the recognition of the Crow Tribe's off-reservation hunting rights in Wyoming would likely lead to joint consultation and cooperative management of game.

ARGUMENT

I. CONGRESS DID NOT IMPLICITLY ABROGATE INDIAN HUNTING RIGHTS IN ENABLING WESTERN STATES TO JOIN THE UNION ON AN "EQUAL FOOTING" WITH ORIGINAL STATES.

As the majority of the Court concluded in *Mille Lacs*, "there is nothing inherent in the nature of reserved treaty rights to suggest that they may be extinguished by *implication* at statehood." *Mille Lacs*, 526 U.S. at 207 (emphasis in original) (distinguishing *Ward v. Race Horse*, 163 U.S. 504 (1896)). Rights to land and usufructuary rights to hunt, fish, or gather reserved by Tribes in treaties and cession agreements simply do not constitute a federal governmental impairment of "fundamental attributes of state sovereignty" so essential to "governmental existence" as to render those reserved tribal rights invalid under the equal footing doctrine. *Id.* at 204 (citing *Coyle v. Smith*, 221 U.S. 559, 573 (1911), and quoting *Race Horse*, 163 U.S. at 516).

Article IV of the Treaty with the Crow Indians, May 7, 1868, 15 Stat. 649, 650 (1869), provided as follows:

> The Indians herein named agree, when the agency-house and other buildings shall be

> constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but *they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.*

(emphasis added).

In the absence of other treaty language or clear evidence of the parties' mutual intent, a determination that such tribal treaty rights evaporate upon statehood would conflict directly with the fundamental underpinnings of treaty interpretation and federal Indian law. A review and analysis of the "history, purpose, and negotiations" of treaties "is central to [their] interpretation . . . ." *Mille Lacs*, 526 U.S. at 202 (citing *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999)). Assigning abrogation effect to silence "would run counter to the principles that treaties are to be interpreted liberally in favor of the Indians . . . ." *Id.* at 194 n.5 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675-76 (1979), and *Winters v. United States*, 207 U.S. 564, 576-77 (1908)). "[W]e interpret Indian treaties to give effect to the terms as Indians themselves would have understood them." *Id.* at 196 (citing *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. at 675-76, and *United States v. Winans*, 198 U.S. 371, 380-81 (1905)). And, while "Congress may abrogate Indian treaty rights . . . it must clearly express its intent to do so." *Id.* at 202 (citing *United States v. Dion*, 476 U.S. 734, 738-40 (1986)).

Those principles dictate that there must be clear evidence that the government's negotiators of treaties or cession agreements had informed Tribes that future statehood would bring an automatic end to their reserved hunting rights, and, in the absence of that clear evidence, the treaties or cession agreements should be interpreted as confirming those rights beyond statehood. Evidence of such disclosure does not exist, and the relative timing of cession agreements and statehood makes it unlikely that the potential abrogation of hunting rights through statehood was even contemplated.

Under the Ute treaty of 1868, the Utes held lands in the western third of what would later become the State of Colorado. Treaty with the Ute, March 2, 1868, 15 Stat. 619 (1869). In 1873, Felix R. Brunot, Chairman of the Board of Indian Commissioners, represented the United States in negotiating the cession of approximately 3.7 million acres of the Ute treaty lands. *See* Agreement of September 13, 1873 ("Brunot Agreement"), ratified by Act of April 29, 1874, 18 Stat. 36 (1874). The practical need for the cession arose from the unlawful influx of miners into a portion of Ute treaty lands upon discovery of hard rock minerals in the San Juan Mountains. In the spring of 1873, approximately one year after Congress had authorized cession negotiations to proceed, Act of April 23, 1872, 17 Stat. 55 (1873), and several months before the parties would reach final agreement, Mr. Brunot wrote to Secretary of the Interior Columbus Delano:

> In my opinion the most important first step towards adjustment of pending difficulties, which cannot long be safely or rightly delayed, is to eject the trespassers from the reservation, and at once to step upon the

> Government, believing, as I do, that a failure to take it will lead to a disastrous conflict with this hitherto friendly people, as unprovoked and unjust as any of those which disgraced the past history of wars with Indians.
>
> There are persons in Colorado, as elsewhere . . . [who] may suggest that the better mode of meeting the case is to concentrate large bodies of troops in the vicinity, permit and encourage encroachments upon the reservation by miners, and be prepared when the collision comes to "make short work" with the Utes. The naked proposition to me seems simply infamous, and I most sincerely hope that the Government will not suffer itself to be drawn into an unjust war by delaying to eject the miners from the reservation.[2]

Removal of miners from the rugged terrain of the San Juans having been deemed impossible, and a Presidential order for their ejectment having been suspended, the negotiators recommenced efforts to obtain the Utes' consent to a cession of a large block of mountainous territory. *See* U.S. Office of Indian Affairs, *Report of the Commission to Negotiate with the Ute Tribe of Indians* (October 15, 1873) in *Papers Accompanying 1873 Commissioner of Indian Affairs Annual Report to the Secretary of the Interior* at 83 (1874) ("Brunot Report"). Only after Mr. Brunot assured the Ute chiefs that they would be able to continue to hunt in the ceded lands, did the Utes agree

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[2] CHARLES LEWIS SLATTERY, FELIX REVILLE BRUNOT 1820-1898, A CIVILIAN IN THE WAR FOR THE UNION, PRESIDENT OF THE FIRST BOARD OF INDIAN COMMISSIONERS 205 (Longmans, Green, and Co., 1901), https://archive.org/details/felixrvellebru01slatgo og.

to set aside the Brunot Cession area from their reservation. *Id.* at 109 (Mr. Brunot to Chief Ouray: "I would say in the paper you could hunt in the part sold as long as there is any game in it."). The agreement averted a disastrous conflict.

Nothing in the language of the Brunot Agreement or in the historical report of negotiations indicates that Colorado's statehood would end the Utes' hunting rights in the San Juan Mountains. Further, in legislatively ratifying the cession agreement, Congress placed no additional limitation on the hunting rights provision allowing the Utes "to hunt upon said lands so long as the game lasts and the Indians are at peace with the white people." Act of April 29, 1874, §1, 18 Stat. 36, 37 (1874) (incorporating Brunot Agreement). The only congressional discussion of the agreement occurred on the House floor preceding passage of the legislation in that body approving the agreement (H.R. 2193, 43rd Cong., 1st Sess. (1874)). Representative Loughridge of Iowa unsuccessfully objected to the legislation on the broad ground "that it confirms *a treaty lasting forever*." 2 Cong. Rec. 2495 (1874) (emphasis added). There is nothing in the legislative history to suggest even remotely that the United States intended to break faith with the Utes by inserting an unwritten limiting condition of statehood on the hunting rights provision.

The Brunot Agreement is noteworthy in part because of the close temporal proximity of its ratification by Congress to Colorado statehood. Less than one month after the Brunot Agreement became law, on April 29, 1874, the House Committee on Territories reported out the bill, H.R. 435, 43rd Cong., 1st Sess. (1874), that became, in essentially the same form, the act enabling Colorado to enter the Union. Act of March 3, 1875, 18

Stat. 474 (1875). It is incomprehensible that Congress considered statehood as nullifying the key provision of a mutually negotiated cession agreement that had averted warfare in the San Juan Mountains only months before. Mr. Brunot certainly had no inkling that such would be the case, and it is reasonably likely that Chief Ouray and the Utes would have rejected the agreement had they thought that their rights to hunt in the San Juans would end within 18 months of their signing the Brunot Agreement. It is even less likely that the parties to the negotiation of the 1868 Treaty between the Crow Tribe and United States would have considered the future carving of states from western territories—Wyoming's statehood more than 20 years later—as terminating off-reservation hunting rights, a critical aspect of the 1868 Treaty with the Crow Indians. *See* Act of July 10, 1890, 26 Stat. 222 (1891) (admitting the State of Wyoming "into the Union on an equal footing with the original States in all respects whatsoever"). In sum, statehood did not terminate the off-reservation hunting rights of *amici* or the Crow Tribe.

II. THE EXERCISE OF TRIBAL HUNTING RIGHTS ON NATIONAL FOREST LANDS DOES NOT CONFLICT WITH THE PURPOSES OF WITHDRAWAL AND RESERVATION OF FORESTS.

In affirming the Sheridan County Circuit Court's conviction of Petitioner for violations of Wyoming hunting laws (Pet. App. 33), Wyoming's Fourth District Court relied principally on *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir., 1995), *cert. denied*, 517 U.S. 1221 (1996). Pet. App. 26. In so doing, the District Court looked to *Repsis* to conclude alternatively that Wyoming's statehood and the

establishment of the Big Horn National Forest each served independently to terminate the Crow Tribe's off-reservation hunting rights and to defeat Petitioner's legal defense. Pet. App. 33-34.

The second determination of *Repsis*, one not even addressed by the *Repsis* trial court, was that "creation of the Big Horn National Forest resulted in the 'occupation' of the land," and consequently, the termination of the Crow Tribe's off-reservation hunting rights in the Big Horn National Forest. *Repsis*, 73 F.3d at 993. The *Repsis* court devoted one paragraph (five sentences) of analysis in concluding that national forest creation constitutes occupancy, without ever examining the compatibility or incompatibility of national forest creation with Crow tribal hunting rights. *Id.* *Amici* submit that the *Repsis* court's conclusion as to the effect of national forest creation was incorrect, and that the Wyoming State District Court's acceptance of that alternative determination should be reversed.

National forest designation by itself does not constitute occupancy and is not inherently inconsistent with reserved tribal hunting rights. In passing Section 24 of the Act of Mar. 3, 1891 (commonly referred to as the Forest Reserve Act), that first authorized the President to establish forest reserves, Congress also expressly provided that "nothing in this act shall change, repeal, or modify any agreements or treaties with Indian tribes for disposal of their lands . . . and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements . . . ." Act of Mar. 3, 1891 §10, 26 Stat. 1095, 1099 (1891).

Under authority of Section 24 of the Forest Reserve Act, President Grover Cleveland initially designated

the Big Horn National Forest as a public forest reserve on February 22, 1897. Pres. Proc. No. 30, 29 Stat. 909 (1897). Far from constituting occupancy, the Presidential Proclamation warned all persons against making legal entry for settlement on the reserved lands. Those limitations on settlement of the lands ultimately designated as the Big Horn National Forest are directly at odds with the notion that the forest lands became occupied and were no longer "unoccupied" upon the national forest's creation.

A. Congress has expressly confirmed Indian country boundaries that include national forest lands.

As of September 30, 2012, national forests in the United States included almost 200 million acres of land "intermingled" with approximately 40 million acres of "other federal land, Tribal, State, local, corporate and private lands." U.S. Dep't of Agric., *Establishment and Modification of National Forest Boundaries and National Grasslands, A Chronological Record 1891-2012* at iv, FS-612 (2012). The complicated histories of Indian reservations include examples of withdrawals of tribal lands for national forest and other purposes, sometimes leaving the status of the withdrawn land uncertain for Indian country purposes.

The Southern Ute Indian Reservation exemplifies the complications arising from allotment, homesteading, national forest withdrawals, and post-Indian Reorganization Act restoration.[3] In 1907, President

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[3] *See, e.g., Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999) (determining ownership of coal bed methane extracted from coal deposits reserved by the United States in patents under 1909 and 1910 Coal Lands Acts and restored to the Tribe under the Indian Reorganization Act).

Theodore Roosevelt issued a proclamation substantially expanding the size of the San Juan Forest Reserve originally established in 1905. Pres. Proc. of March 2, 1907, 34 Stat. 3308 (1907); Pres. Proc. of June 3, 1905, 34 Stat. 3070 (1907). While the original San Juan Forest Reserve consisted of lands in the Brunot Cession area, a portion of the 1907 expansion brought in approximately four governmental townships located within the remaining un-ceded Southern Ute Indian Reservation.[4] The jurisdictional status of the on-reservation, national forest townships remained uncertain for decades. In 1984, Congress confirmed the exterior boundaries of the Southern Ute Indian Reservation as including more than 80 square miles of federally-owned land within the reservation townships that had been part of the 1907 expansion and clarified the jurisdictional status of those lands. Act of May 21, 1984, Pub. L. No. 98-290, § 3, 98 Stat. 201, 202.

For purposes of the conduct of the Southern Ute Indian Tribe, its members, and other Native Americans, that San Juan National Forest land overlapping the boundaries of the Reservation is expressly considered Indian country. Congressional recognition of a sizeable portion of national forest land as being within an Indian reservation renders unpersuasive the suggestion that tribal hunting rights cease to exist once

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[4] The entire San Juan National Forest contains approximately 1.9 million acres consisting principally of ceded lands from the Brunot Cession. *See* U.S. Forest Service, U.S. Dep't of Agric., *Record of Decision, Final Environmental Impact Statement for the San Juan National Forest Land and Resource Management Plan* at 4 (Sept. 2013), http://www.fs.fed.us/r2/sanjuan/ (providing Forest Service Plan 2013).

national forest designation is obtained. Instead, the exercise of tribal hunting rights—and the more expansive status of Indian country—is compatible with national forest status.[5]

B. Treating national forest creation as occupancy that defeats Indian hunting rights far exceeds the conflict-avoidance objectives of conditioning such rights upon non-occupation.

Conflict avoidance was a common goal during negotiations with Tribes in the late 1860s and early 1870s. Toward that end, Congress created the Indian Peace Commission in 1867 to negotiate treaties with "Indian tribes" and to "insure civilization for the Indians and peace and safety for the whites." Act of July 20, 1867 §1, 15 Stat. 17 (1869). The Indian Peace Commission represented the United States in negotiations with the Crow Tribe and the Shoshone and Bannock Tribes in 1867 and 1868. *See* U.S. Office of Indian Affairs, *Report to the President by the Indian Peace Commission* (January 7, 1868) in *Papers Accompanying Commissioner of Indian Affairs Annual Report to the Secretary of the Interior* for the *Year 1868* at 26 (1868); *Extract from Report of the Secretary of Interior* at III (1868).

Hunting by tribal members on lands occupied by settlers certainly increased the potential for conflict. Thus, the language in Article IV of the 1868 Treaty with the Crows, 15 Stat. 650, and other treaties negotiated that same year, limiting the right to hunt

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[5] Aside from the portions of the San Juan National Forest within the Southern Ute Indian Reservation, the Brunot Cession lands within which *amici* exercise off-reservation hunting rights also include portions of the Uncompahgre National Forest.

to the unoccupied lands of the United States, was likely intended to ensure that "peace subsists among the whites and Indians."

Similarly, during negotiations with the Utes in 1873, Felix R. Brunot mentioned a visit earlier in the year with another Tribe where "the white man had gone upon their lands," and Mr. Brunot could foresee that "war would be made an excuse to get the land for nothing." Brunot Report at 101. As previously discussed, *see* pp. 6-8, *supra,* rising tensions between white miners and the Utes within the borders of the Utes' 1868 reservation underlay the negotiations in 1873 between the Utes and the Board of Indian Commissioners. When the bill to ratify the Brunot Agreement, H.R. 2193, was presented in the House of Representatives on March 26, 1874, congressional speakers acknowledged the urgency of ratifying the agreement to appease the Utes and avoid an "Indian war." 2 Cong. Rec. 2494-95 (1874). In countering objections to the agreement, Representative Averill stated that the bill was "of the greatest public necessity" and that, unless the bill passed immediately, "results of a serious nature will ensue" and "war will be inevitable with those Indians." *Id.* at 2495. Compounding Representative Averill's statements, Representative McNulta added, "We want to give the Indians the rights they are entitled to under the treaty, if they do not get them soon I apprehend they will make a fight for them." *Id.*

Clearly the principal concern among governmental negotiators and Tribes during the late 1860s-1870s was maintaining peace in the face of the expanding pressures of western settlement. The preservation of forests through the establishment of forest reserves could not have been foreseen as an event that would

heighten hostilities or as meeting the "occupancy" condition on ceded lands that would end tribal hunting rights. Indeed, as Congress expressly directed in the law initiating the withdrawal of forest reserves, the preservation of forest lands was not intended to "change, repeal, or modify any agreements or treaties with Indian tribes." Act of Mar. 3, 1891 §10, 26 Stat. at 1099.

III. THE CONFIRMATION OF OFF-RESERVATION TRIBAL HUNTING RIGHTS CAN FOSTER COOPERATIVE GAME MANAGEMENT PRACTICES BETWEEN STATES AND TRIBES INVOLVING BOTH ON-RESERVATION AND OFF-RESERVATION LANDS.

Amici and the State of Colorado have previously disagreed about the existence and scope of *amici's* hunting rights and, in the 1970s, both *amici* engaged in separate litigation with the State of Colorado over their members' exercise of hunting rights, litigation resembling the current dispute between the Petitioner and the State of Wyoming. In one case, *People v. Whyte,* a member of the Ute Mountain Ute Tribe holding a tribal hunting license, killed a deer for food in the Brunot Cession area in the San Juan National Forest. He was stopped by State wildlife officials, who confiscated the deer and cited him for killing a deer without a valid Colorado hunting license. The tribal member's citation was the subject of lengthy litigation, first in the Montezuma County Court (which dismissed the charges based on the Brunot Agreement) and then in the Colorado State District Court, which reversed the lower court decision and remanded the matter for additional proceedings. *People v. Whyte,* Docket No. 7256 (Cnty Ct. for Montezuma County,

Colo., June 4, 1973) *rev'd*, Crim. Action No. 1727 (Dist. Ct. for Montezuma County, Colo., June 10, 1974).

On the heels of the *Whyte* case, the Ute Mountain Ute Tribe commenced a federal declaratory judgment action against the State of Colorado to confirm Brunot Agreement hunting rights. *Ute Mountain Tribe of Indians v. State of Colorado*, C.A. No. 78-C-O220 (D. Colo., filed March 1, 1978). The case was resolved through entry of a consent decree signed by representatives of the parties and the Department of the Interior, and approved by Senior District Court Judge Hatfield Chilson, that recognized the right of Ute Mountain Ute tribal members to hunt in the Brunot Cession Area for subsistence, religious, or ceremonial purposes without State licensing but as authorized under permits issued by the Ute Mountain Ute Tribe. *See id.*, Consent Decree (July 6, 1978). The Consent Decree also provided for coordination between tribal and Colorado officials in designating areas for hunting outside of normal state seasons and for ongoing cooperative management activities.

In another situation, a Southern Ute tribal member was cited by both the Southern Ute Indian Tribe and the State for an incident that occurred on private, non-Indian fee land within the exterior boundaries of the Southern Ute Indian Reservation. The Tribe convicted the tribal member for unlawfully killing three deer. The State of Colorado cited the tribal member for unlawfully possessing three deer and for hunting without a valid and proper Colorado hunting license. With the support of the Tribe, the tribal defendants sought to enjoin the State prosecution of the tribal member in federal district court. *Silva v. Hyde*, C.A. No. C-3858 (D. Colo., filed March 17, 1972). To resolve

the dispute, the parties entered into a stipulation, which, in addition to ending the State proceedings, addressed the hunting activities of tribal members off the Reservation and the hunting activities of both Indians and non-Indians on the Reservation. Notably, the Tribe agreed to refrain from exercising its off-reservation hunting rights outside the exterior boundaries of the Reservation with the caveat that such agreement did not waive the Tribe's right subsequently to assert its off-reservation hunting rights. *Id.*, Order (Aug. 30, 1972) (approving Stipulation and Settlement).

As time has passed, *amici* and the State of Colorado have refined their mutual understandings and signed separate agreements in 2008 and 2013 governing the exercise of *amici's* off-reservation hunting rights in the Brunot Cession area. *See* Memorandum of Understanding between the Ute Mountain Ute Tribe and the State of Colorado Concerning Wildlife Management and Enforcement in the Brunot Area (Jan. 10, 2013); Memorandum of Understanding between the Southern Ute Indian Tribe and the State of Colorado Concerning Wildlife Management and Enforcement in the Brunot Area (Sept. 15, 2008). As described in the recitals of those agreements, the parties seek to, "promote cooperation and communication in the management and use of Brunot Area wildlife resources . . . avoid confrontation related to the exercise of enforcement jurisdiction by the Tribe and State . . . provide a process to avoid and resolve conflicts . . . and facilitate exercise of the Tribe's Brunot Agreement rights in a manner that is respectful of the interests" of each Tribe and the State.

Each memorandum of understanding takes a partnership approach to managing deer, elk, and other

game in the Brunot Cession area, ensuring that "the game lasts" for the long-term benefit of *amici* and the State. Pursuant to its memorandum of understanding with the State, the Southern Ute Indian Tribe has issued extensive hunting regulations specific to the Brunot Cession area that address opening and closure dates, bag and possession limits, firearm and equipment requirements, and permitting requirements. Southern Ute tribal officials update these regulations on a yearly basis. *See* Division of Wildlife Resource Management, Southern Ute Indian Tribe, *2018-2019 Brunot Area Hunting & Fishing Proclamation for Brunot Hunting & Fishing by Southern Ute Tribal Members*, https://www.southernute-nsn.gov/natural-resources/wildlife-resource-management/hunting (providing Documents). Additionally, the Southern Ute Indian Tribe's officials meet regularly with the officials from Colorado's Parks and Wildlife Division to exchange information about the Brunot Cession area, including wildlife data, planning and management goals for upcoming hunting seasons, and permitting and harvesting quotas.

Amici's off-reservation hunting rights and the State of Colorado's acknowledgment of those rights were the impetus for the cooperative Tribe-State relationship that exists today. The arc of *amici's* relationship with the State with respect to the Brunot Cession area demonstrates that off-reservation hunting rights are not incompatible with State interests, and the agreements between the *amici* and the State of Colorado have fostered relationships that serve the conservation and management interests of both the Ute Tribes and the State.

The experiences of *amici* suggest that recognition of Crow tribal hunting rights in the Big Horn National

Forest in Wyoming would lead to cooperative engagement between the Crow Tribe and the Respondent in game management. The recognition of the Crow Tribe's hunting rights is consistent with longstanding precedent confirming the supremacy of federal law established by treaty with respect to the regulation of wildlife. *Hughes v. Oklahoma*, 441 U.S. 322, 342 (1979); *Missouri v. Holland*, 252 U.S. 416, 434 (1920). The primacy of federal law, animated by the "conservation necessity" accommodation of State interests in management of natural resources, should ensure that the Crow Tribe's "federally guaranteed" off-reservation hunting rights continue to be reasonably utilized by tribal members for the foreseeable future. *Mille Lacs*, 526 U.S. at 205.

CONCLUSION

The Court should reverse the conviction of Petitioner and the judgment of the District Court for Sheridan County, Wyoming.

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No. 17-532

In the Supreme Court of the United States

CLAYVIN B. HERRERA, PETITIONER

v.

STATE OF WYOMING

ON WRIT OF CERTIORARI
TO THE DISTRICT COURT OF WYOMING, SHERIDAN COUNTY

BRIEF FOR WESTERN ASSOCIATION OF FISH AND WILDLIFE AGENCIES AND CONSERVATION, HUNTING, FISHING, AND OUTFITTER AND GUIDE ASSOCIATIONS AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE*

The Western Association of Fish and Wildlife Agencies (WAFWA) is an Idaho non-profit corporation whose members are 19 state fish and wildlife

* No counsel for a party authored this brief in whole or in part, and no person other than amicus, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief. Both parties have entered blanket consents to the filing of amicus briefs.

agencies from across the western United States, as well the provincial fish and game agencies from three western Canadian provinces and two Canadian territories. Altogether, WAFWA's members oversee an area covering nearly 3.7 million square miles of some of North America's most wild and scenic country. Founded in 1922, WAFWA seeks to advance collaborative, proactive science-based fish and wildlife conservation and management across the West.

The Boone and Crockett Club, founded in 1887 by Theodore Roosevelt and George Bird Grinnell, is the oldest wildlife conservation organization in North America. It is the mission of the Boone and Crockett Club to promote the conservation and management of wildlife, especially big game, and its habitat. Boone and Crockett's efforts to establish a foundation and framework for conservation in America includes an emphasis on science-based professional wildlife research and management, consistent with the tenets of the North American Model for Wildlife Conservation. Boone and Crockett, through its members, was instrumental in saving elk from extinction and was an initiator and champion of the first National Parks and the earliest science-based wildlife management efforts and legislation.

Founded in 1984, the Rocky Mountain Elk Foundation (RMEF) is the leading organization focused primarily on the conservation of wild elk. The mission of RMEF is to ensure the future of elk, other wildlife, their habitat and America's hunting heritage. With over 500 volunteer chapters across the country and more than 227,000 members, RMEF has worked to protect and enhance more than 7.3 million acres of

North American wildlife habitat and has partnered with eastern, midwestern and western States to reintroduce elk to historic ranges.

The Wyoming Outdoorsmen is a broad-based coalition of sportsmen and sportswomen established to promote the improvement of hunting, fishing, trapping, quality habitat programs and other outdoor experiences for youth and family involvement. The Wyoming Outdoorsmen's over 780 active members work closely with state and local governments and nongovernmental organizations to improve wildlife habitat and conservation through quality wildlife management practices.

The Wyoming Outfitter and Guide Association (WYOGA) is a trade association with a membership of over 100 licensed outfitters. Cody Country Outfitter and Guides Association (CCOGA) is a trade association made up of outfitters from the area surrounding Cody, Wyoming. Both WYOGA and CCOGA support the current wildlife-management model that, for more than 100 years, has helped ensure Wyoming has healthy, sustainable wildlife populations that provide recreational opportunities for the hunting and nonhunting public.

Amici are keenly interested in the outcome of this case, which threatens not only to overturn the delicate balance of federal, state, and tribal fish and wildlife jurisdictions that have served the public's interests in the western United States since the late 1800s, but also to undermine the two basic principles of the North American Model of Wildlife Conservation: that fish and wildlife belong to all Americans, and that they

need to be managed in such a way that their populations will be sustained forever.

SUMMARY OF ARGUMENT

The Second Treaty of Fort Laramie reserved to the Crow Tribe "the right to hunt on unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Treaty between the United States of America and the Crow Tribe of Indians (1868 Treaty), May 7, 1868, 15 Stat. 649. In 1896, this Court held that this right was a "temporary and precarious" one that terminated upon Wyoming's admission to the Union. *Ward v. Race Horse*, 163 U.S. 504, 515 (1896). Under *Race Horse*, petitioner's conviction for violating Wyoming's game laws should be affirmed.

Petitioner argues that this Court overruled *Race Horse* in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), but that is not so. Although the Court in *Mille Lacs* noted that part of *Race Horse*'s reasoning had been abrogated by subsequent decisions, it expressly reaffirmed what it characterized as an "alternative holding" of *Race Horse*—that "[t]he treaty rights at issue were not intended to survive Wyoming's statehood." *Id.* at 206. That alternative holding resolves this case.

Even apart from the precedential value of *Race Horse*, the decision reflects a correct interpretation of the treaty in light of its historical context. The hunting right reserved in the 1868 Treaty was understood to be temporary because the treaty contemplated that the Crow Tribe would transition to farming from sub-

sistence hunting and the historical circumstances demanded it. In addition, the treaty extended the hunting right only to "hunting districts." 1868 Treaty, art. 4, 15 Stat. 650. This Court previously recognized that the creation of Yellowstone National Park removed the park from the scope of the "hunting districts" recognized by treaty. The creation of the Bighorn National Forest did the same.

Even if this Court were to reject the interpretation of the treaty reflected in *Race Horse*, the judgment should still be affirmed because the Wyoming law at issue is a reasonable and nondiscriminatory conservation measure. State regulation of hunting, like the regulation at issue here, is essential to the preservation of wildlife.

ARGUMENT

A. The Court's decision in *Race Horse* establishes that the treaty right to hunt has been terminated

1. In *Race Horse*, this Court construed treaty language materially identical to that at issue here, and it determined that the language created only a "temporary and precarious" right to hunt. 163 U.S. at 510. That case involved Article 4 of the Treaty Between the United States of America and the Eastern Band of Shoshonees and the Bannack Tribe of Indians, July 3, 1868, 15 Stat. 674-75, which guaranteed "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Emphasizing the treaty language limiting the right to "unoccupied lands

of the United States" within "the hunting districts," the Court reasoned that the treaty "clearly contemplated the disappearance of the conditions therein specified." 163 U.S. at 509-10. And having determined that the treaty right was "temporary and precarious [in] nature," the Court noted that Wyoming had been admitted to the Union as "a sovereign State, a necessary incident of whose authority was the complete power to regulate the killing of game within its borders." *Id.* at 510. The Court explained that the statute admitting Wyoming on an equal footing with other States "would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law." *Id.* at 511. Although the Court acknowledged that "treaties should be so construed as to uphold the sanctity of the public faith," it concluded that the treaty could not be read "to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the States." *Id.* at 516.

2. In 1995, the Tenth Circuit addressed the same question the *Race Horse* Court resolved in 1896—whether "the right to hunt on the unoccupied lands of the United States" reserved to the Crow Tribe the right to hunt in violation of Wyoming laws. *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996). In that case, which arose after a member of the Crow Tribe was convicted of killing an elk in the Bighorn National Forest in violation of state law, the Tribe argued that *Race Horse* was no longer good law because, it said,

this Court had repudiated the propositions that states have plenary control over game and that the equal-footing doctrine abrogates treaty hunting rights. *Id.* at 985, 988. The Tenth Circuit rejected the first argument as a mischaracterization of this Court's decisions regarding state regulation of wildlife. *Id.* at 990. As to the equal-footing doctrine, the Tenth Circuit held that while the "doctrine does not prevent the United States from creating a right in a territory which would be binding on the state upon its admission," such a treaty right must be "continuing or perpetual," which "the right to hunt on the unoccupied lands of the United States" was not. *Id.* at 991. The court also concluded that the statute creating the Bighorn National Forest "resulted in the 'occupation' of the land," such that the hunting right could not have applied. *Id.* at 993.

3. The *Repsis* decision was a final judgment with respect to the right asserted by the Crow Tribe on behalf of its enrolled members. As Wyoming has explained (at 21-38), principles of issue preclusion make that judgment binding upon petitioner, a member of the Crow Tribe. But even if the *Repsis* judgment did not have preclusive effect, it would still be entitled to respect because it correctly applied *Race Horse*, which resolves the question presented here.

Petitioner argues (at 28) that this Court "thoroughly repudiated *Race Horse*'s reasoning" in *Mille Lacs*. That is incorrect. While the Court in *Mille Lacs* rejected the equal-footing doctrine as a basis for abrogating treaty rights, it did not disturb *Race Horse*'s conclusion that "the right to hunt on the unoccupied lands of the United States" was intended to be tempo-

rary and was terminated upon Wyoming's admission to the Union. As the *Mille Lacs* Court explained: "*Race Horse* rested on the premise that treaty rights are irreconcilable with state sovereignty. It is *this conclusion*—the conclusion undergirding the *Race Horse* Court's equal footing holding—that we have consistently rejected over the years." 526 U.S. at 205 (emphasis added).

Significantly, the Court in *Mille Lacs* went on to emphasize that "[t]he equal footing doctrine was only part of the holding in *Race Horse*," and that *Race Horse* also "announced an alternative holding: The treaty rights at issue were not intended to survive Wyoming's statehood." 526 U.S. at 206. The Court explained that the 1837 treaty with the Chippewa, the treaty at issue in *Mille Lacs*, was different from the treaty at issue in *Race Horse* because "*unlike* the rights at issue in *Race Horse*, there is no fixed termination point to the 1837 Treaty rights." *Id.* at 207 (emphasis added). As the Court observed, "[t]he Treaty in *Race Horse* contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States; the happening of these conditions was 'clearly contemplated' when the Treaty was ratified." *Id.* (quoting *Race Horse*, 163 U.S. at 509). Contrary to petitioner's argument, *Mille Lacs* thus reaffirmed the key holding of *Race Horse* with respect to the Wyoming treaty. That holding controls this case.

B. The hunting right was intended to be temporary and was terminated by the disappearance of game and the establishment of the Bighorn National Forest

This Court has explained that departing from precedent requires "'special justification'—over and above the belief 'that the precedent was wrongly decided.'" *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014)). Petitioner has provided no "special justification" for departing from *Race Horse*, and he has not shown that it was wrongly decided. To the contrary, the interpretation adopted in *Race Horse* is compelled by the text and historical context of the treaty.

To interpret treaty language, the Court must "begin with the text of the treaty," but it must also consider "the context in which the written words are used." *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1508-09 (2017) (quoting *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694, 699 (1988)); *accord Mille Lacs*, 526 U.S. at 196 (Courts must "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'") (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)). And interpretation must take into account "the common notions of the day." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

Like the treaty at issue in *Race Horse*, the 1868 Treaty reserved "the right to hunt on the unoccupied

lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Art. 4, 15 Stat. 650. Understood in historical context, that language created an "essentially perishable" interest, an interest that no longer exists within the Bighorn National Forest in Wyoming. *Race Horse*, 163 U.S. at 515.

1. As this Court noted in *Race Horse*, the treaty language contains an important limitation: the right to hunt extends only to "unoccupied lands of the United States," and only to "lands of that character embraced within what the treaty denominates as hunting districts." 163 U.S. at 508. Wyoming has explained (at 55-62) that the creation of the Bighorn National Forest rendered that land "occupied" in the sense contemplated by the treaty. The creation of the Bighorn National Forest was also significant for the independent reason that it removed the land from the "hunting districts."

The Court in *Race Horse* explained the meaning of the treaty's reference to "hunting districts" by examining the statutes creating Yellowstone National Park in 1872, just four years after the treaty at issue here was ratified. 163 U.S. at 510; *see* Act of Mar. 1, 1872, ch. 24, 17 Stat. 32. In creating the park, Congress directed the Secretary of the Interior to remove trespassers and to promulgate regulations to prevent "the wanton destruction of the fish and game" found in the park. *Id.* § 2, 17 Stat. 33. This Court viewed Congress' decision to remove Yellowstone from the "hunting districts" so soon after executing treaties with the Plains Tribes as "a clear indication of the sense of

Congress on the subject." *Race Horse*, 163 U.S. at 510. As the Court explained, "[t]he construction which would affix to the language of the treaty any other meaning than that [of a temporary right] would necessarily imply that Congress had violated the faith of government and defrauded the Indians by proceeding immediately to forbid hunting in a large portion of the territory where it is now asserted there was a contract right to kill game created by the treaty in favor of the Indians." *Id.*

The creation of the Bighorn National Forest had a similar effect because it, like Yellowstone National Park, was carved out of the "hunting districts" in which the Crow Tribe could previously hunt. In 1897, President Cleveland exercised authority granted by Congress to establish what would eventually be named the Bighorn National Forest. Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897); *see* Act of Mar. 3, 1891, § 24, ch. 561, 26 Stat. 1103. The proclamation reserved the land "from entry or settlement" and warned "all persons not to enter or to make settlement upon the tract of land reserved by this proclamation," thereby closing public land to settlement on the forest. 29 Stat. 910. Later that year, Congress provided that the "jurisdiction, both civil and criminal, over persons within such [forest] reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned." Act of June 4, 1897, ch. 2, 30 Stat. 36 (16 U.S.C. § 480). That statute ensured that the State of Wyoming would retain concurrent jurisdiction, with the federal government, over the forest. *See Wilson v. Cook*, 327 U.S.

474, 487 (1946) ("Congress in effect has declined to accept exclusive legislative jurisdiction over forest reserve lands."); *United States v. County of Fresno*, 429 U.S. 452, 455 (1977) ("Pursuant to 16 U.S.C. § 480, the States retain civil and criminal jurisdiction over the national forests notwithstanding the fact that the national forests are owned by the Federal Government."). If the restrictions on hunting contemplated by the statute creating Yellowstone National Park were sufficient to show that the park had been "carved out of what constituted the hunting districts," *Race Horse*, 163 U.S. at 510, then the restrictions on hunting provided by Wyoming law, which Congress and the President made applicable to the Bighorn National Forest when they set it aside, must have a similar effect.

2. The limited availability of game and the assumption that game would disappear also support the Court's conclusion in *Race Horse*. Article 4 of the 1868 Treaty provides that the "right to hunt" applies only "so long as game may be found" within the "unoccupied lands of the United States." 15 Stat. 650. At the time the treaty was signed, it was understood by all that game would not continue to "be found" indefinitely. The recommendations of the Indian Peace Commissioners, which President Johnson submitted to Congress, made that understanding clear: "When the buffalo is gone the Indians will cease to hunt. A few years of peace and the game will have disappeared. In the meantime by the plan suggested we will have formed a nucleus of civilization around the young that will restrain the old and furnish them a home and subsistence when the game is gone." H.R. Exec. Doc. No.

97, 40th Cong., 2d Sess. 18 (1868). And the tribes had a similar understanding. *See* Helen Hunt Jackson, *Century of Dishonor: A Sketch of the United States Government's Dealings With Some of the Indian Tribes* 71 (1881) (describing the desire of the Plains Indians to establish friendly relations with the United States Government because with thinning of buffalo herds, "starvation stared them in the face, and they knew it").

Other provisions of the 1868 Treaty reflect the understanding that the Crow Tribe would convert from subsistence hunting to farming. Article 6 grants Indians who wish to farm the right to select up to 320 acres for their exclusive possession and occupation, on the condition that they cultivate the land. 15 Stat. 650-51. The government promised to provide "seeds and agricultural implements," as well as "one good American cow and one good, well-broken pair of American oxen" to those Indians who began to farm. Arts. 8, 9, 15 Stat. 651-52. The government also promised annual appropriations "for the purpose of such articles as, from time to time, the condition and necessities of the Indians may indicate to be proper," with the specified appropriation being twice as large for "each Indian engaged in agriculture" as for "each Indian roaming." Art. 9, 15 Stat. 652. The government even promised a bonus to the ten tribal members who "grow the most valuable crops." Art. 12, 15 Stat. 652. Those provisions demonstrate that the hunting right—like the need for subsistence hunting—"was to cease." *Race Horse*, 163 U.S. at 515.

3. The prospect that game would disappear was not merely contemplated by the treaty negotiators; it ac-

tually came to pass. Just over a decade after the treaty was signed, the Commissioner of Indian Affairs reported that it was "but a question of short time when the rapid settlement of the country and the disappearance of the buffalo will necessitate the confinement of the Crows to their reservation." U.S. Dep't of the Interior, *Annual Report of the Commissioner of Indian Affairs* XXIII (1881). By the early to mid-1880s, the buffalo were largely gone in the region, elk were scarce, and deer and antelope could be found only "after miles of hard travel." U.S. Dep't of the Interior, *Annual Report of the Commissioner of Indian Affairs* 212 (1885).

In 1889, the Department of the Interior issued a circular stating, "[i]n view of the settlement of the country and the consequent disappearance of the game, the time has long since gone by when the Indians can live by the chase." U.S. Dep't of the Interior, *Annual Report of the Commissioner of Indian Affairs* 67 (1894). And soon thereafter, the elk population was greatly diminished throughout Wyoming and had disappeared from the Bighorn National Forest. Carolyn B. Meyer, et al., United States Department of Agriculture, Forest Service, Rocky Mountain Research Station, *Historic Range of Variability for Upland Vegetation in the Bighorn National Forest, Wyoming* 15 (2005) (*Historic Range*).

By the early 20th century, the period of time in which "game may be found" had come to an end. Significantly, the elk that petitioner shot were present in the Bighorn National Forest because elk were reintroduced to the forest in 1909. *Historic Range* 15-16.

C. Wyoming's game regulations are reasonable, nondiscriminatory, and necessary for conservation

Since 1896, Wyoming has acted in reliance on this Court's decision in *Race Horse* to rebuild game populations and develop conservation strategies to protect wildlife. Even if this Court were to conclude that *Race Horse* misinterpreted the treaty language, and even if, notwithstanding the State's reliance interests, the Court were to conclude that *Race Horse* should be overruled, the Wyoming law at issue here should nevertheless be upheld because it is a reasonable, nondiscriminatory regulation that is necessary for the conservation of wildlife.

1. This Court has recognized the important role of States in regulating wildlife, even when treaty hunting and fishing rights are at issue, and the challenges of joint management. In *Kennedy v. Becker*, 241 U.S. 556 (1916), for example, the Court upheld the conviction of three Seneca Indians charged with spearing fish in violation of New York law. Construing treaty language conveying "the privilege of fishing and hunting on the said tract of land," the Court explained that "[t]he right thus reserved was not an exclusive right" that could be managed by both the State and the tribe. *Id.* at 562. "Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both." *Id.* at 563. The Court observed that "it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life." *Id.*

"[T]he existence of the sovereignty of the state," by contrast, "was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not." *Id.*

That holding reflects the understanding of all treaty parties during the 19th century that States would ultimately regulate the wildlife within their borders because they had the exclusive power to do so. *See Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 411-18 (1842) (fisheries within exclusive control of States); *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1855) (public right in fishery includes "the legislative power . . . to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States for a disobedience . . . of the commands of such a law"); *McCready v. Virginia*, 94 U.S. 391 (1877) (State could prohibit residents of other States from planting or taking oysters in tidewaters); *Geer v. Connecticut*, 161 U.S. 519, 530 (1896) ("[S]tate has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of its people.").

To be sure, this Court observed in *Mille Lacs* that "an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State." 526 U.S. at 204. But that modern view does not alter the understanding that prevailed when the treaty was negotiated in the 19th century. And in any event, the Court recognized in *Mille Lacs* "that Indian treaty-based usufructuary rights do not guarantee the Indians 'absolute freedom' from state regulation." *Id.* at 204 (quoting *Oregon Dep't of Fish and Wildlife v.*

Klamath Tribe, 473 U.S. 753, 765 n.16 (1985)). To the contrary, the Court has "repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation." *Id.* at 205; *accord Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Antoine v. Washington*, 420 U.S. 194 (1975); *Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392 (1968).

2. Congress has recognized the important role of States in regulating hunting, including hunting on federal lands. Thus, "[d]espite its ability to take control into its own hands, Congress has traditionally allotted the authority to manage wildlife to the states." *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1248 (D.C. Cir. 1980). With respect to the National Forests, Congress has expressly preserved and reaffirmed existing state jurisdiction. *See, e.g.*, 16 U.S.C. § 528 ("Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests."); 43 U.S.C. § 1732(b) ("[N]othing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife."). Indeed, "each successive statute enacted since [the creation of the National Forest System] purporting to govern the management of the national forests has acknowledged and confirmed the situs states' continuing authority to

regulate hunting and fishing thereon generally." *Fund for Animals, Inc. v. Thomas*, 932 F. Supp. 368, 370 (D.D.C. 1996), *aff'd*, 127 F.3d 80 (D.C. Cir. 1997).

This traditional allocation of authority over hunting is also reflected in Forest Service regulations. Hunting in violation of state law is prohibited in the National Forests, 36 C.F.R. § 261.8(a), and under 36 C.F.R. § 241.2, "[o]fficials of the Forest Service will cooperate with State game officials in the planned and orderly removal in accordance with the requirements of State laws of the crop of game, fish, fur-bearers, and other wildlife on national forest lands." Executive Order 13,443, § 2(d), 72 Fed. Reg. 46,537 (Aug. 16, 2007) likewise directs the Department of Agriculture to "[w]ork collaboratively with State governments to manage and conserve game species and their habitats in a manner that respects private property rights and State management authority over wildlife resources."

3. State regulation remains necessary to the conservation of wildlife. Westward expansion into the area that is now the State of Wyoming brought with it the over-exploitation of important species by commercial hunting and overharvest. *Parker Land and Cattle Co. v. Wyoming Game and Fish Comm'n*, 845 P.2d 1040, 1053 (Wyo. 1993). As noted above, elk had largely disappeared before their reintroduction in the early 20th century.

Wyoming's long history of wildlife management demonstrates that the State's exercise of jurisdiction over game and fish has been essential to ending and preventing the over-exploitation of wildlife resources by unregulated hunting. *See generally Parker*, 845 P.2d at 1052-1056 (describing early history of state

regulation of hunting in Wyoming); *see also* David Willms and Anne Alexander, *The North American Model of Wildlife Conservation in Wyoming: Understanding It, Preserving It, and Funding Its Future*, 14 Wyo. L. Rev. 659 (2014) (*North American Model*). As early as 1869, Wyoming's first Territorial Legislature enacted a statute regulating the sale of fish and game, but the law set no harvest limits and contained no enforcement provisions for the taking of wildlife, and it proved ineffective. *Parker*, 845 P.2d at 1054; *see also* Willms and Alexander, *North American Model* 673. Throughout the 1870s and 1880s, the Territory "slowly and haltingly passed laws in feeble efforts to provide some semblance of protection for game and fish." *Parker*, 845 P.2d at 1054. Slow progress continued at the turn of the 20th century, with the establishment of hunting seasons and the creation of the office of the State Game Warden. *Id.* at 1055-56.

After the turn of the 20th century, Wyoming continued to enact laws requiring hunting licenses, establishing a state game commission, and providing funding for wildlife management activities. Willms and Alexander, *North American Model* 674-675. Since 1929, the Wyoming Game Commission has had the authority to open and close hunting seasons and to set bag limits. *Id.* at 675. Wyoming also adopted a comprehensive set of laws addressing its responsibility to manage wildlife. *Id.*

It is essential to the conservation of wildlife within the State that Wyoming continue its comprehensive management of hunting, including by members of Indian tribes on National Forests lands. Unauthorized hunting continues to pose a direct threat to wildlife

populations in the United States. *See* Ruth S. Musgrave, et al., *The Status of Poaching in the United States—Are We Protecting our Wildlife?*, 33 Nat. Resources J. 977 (1993). In addition, unlicensed hunting indirectly undermines state wildlife management efforts—for all wildlife resources, not just game animals—by reducing a principal funding stream for state wildlife agencies. *See* Willms and Alexander, *North American Model* 670-73. Wyoming's wildlife management efforts, as in nearly every State, are funded primarily through the sale of state hunting licenses and through excise taxes on firearms, ammunition, and archery and fishing equipment. *Id.*

Wyoming's hunting laws apply equally to non-Indians and Indians and therefore do not discriminate. Wyo. Stat. Ann. §§ 23-3-102(d), 23-6-205(a). The law at issue here should therefore be upheld as a reasonable, nondiscriminatory regulation that is necessary to the conservation of wildlife.

CONCLUSION

The judgment of the Wyoming district court should be affirmed.

Respectfully submitted.

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NOVEMBER 2018

No. 17-532

In the Supreme Court of the United States

Clayvin Herrera,

Petitioner,

v.

State of Wyoming,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF WYOMING, SHERIDAN COUNTY

AMICI CURIAE BRIEF OF WYOMING STOCK GROWERS ASSOCIATION, WYOMING FARM BUREAU FEDERATION, WYOMING WOOL GROWERS ASSOCIATION, MONTANA FARM BUREAU FEDERATION, IDAHO FARM BUREAU FEDERATION, UTAH FARM BUREAU FEDERATION, COLORADO FARM BUREAU FEDERATION, AND SOUTH DAKOTA CATTLEMEN'S ASSOCIATION IN SUPPORT OF RESPONDENT

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November 20, 2018

QUESTION PRESENTED

The *amici curiae* file this brief in support of the State of Wyoming to focus on an important aspect of the Question Presented to the Court, namely:

If neither Wyoming's admission to the Union nor the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty hunting rights, are federally managed lands that are leased or permitted to private third parties "[]occupied" by function of those leases or permits and thereby not subject to the hunting rights established in the 1868 Crow Tribe Treaty?

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IDENTITIES AND INTERESTS OF AMICI CURIAE[1]

Amici curiae represent farming and ranching interests across the western United States—including over 175,000 members in six separate states. Among these groups, the *amici curiae* fall into three broad categories. First, a number of the *amici curiae* operate in and represent members who occupy federally managed land pursuant to leases and permits in areas subject to the treaty hunting right contained in the Crow Tribe Treaty at issue in this case. Second, a number of the *amici curiae* operate in and represent members who occupy federally managed land pursuant to leases and permits in areas subject to different treaties that use identical language to the Crow Tribe Treaty at issue in this case. Finally, the remainder of the *amici curiae* operate in and represent members who occupy federally managed land pursuant to leases and permits in areas subject to other treaty hunting rights, based on different language than the Crow Tribe Treaty.

Federal lease and permit holders, like those represented by *amici curiae*, pay the United States for the privilege of grazing livestock on federally managed lands, including national forest lands. *See* Appendix A, USDA Forest Service: Term Private Land

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[1] The parties have consented to the filing of this *amici curiae* brief. *See* Supreme Court Rule 37.3(a). Additionally, pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae*, their members, or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Grazing Permit. These lessees and permittees do so under a number of conditions imposed by the United States, such as managing, protecting, and improving (when necessary) the lands subject to the permit. *See id.* In exchange, federal permit and leaseholders have the right to be present on the subject lands, graze their livestock on those lands, and exert a level of control over the lands. *See id.*

I. *AMICI CURIAE* IN THE GEOGRAPHIC AREA AFFECTED BY THE CROW TRIBE TREATY

Wyoming Stock Growers Association ("WSGA") is a non-profit membership organization founded in 1872 and incorporated under the laws of the State of Wyoming. WSGA represents over 1,200 livestock producers across the state and advocates for the interests and advancement of the livestock industry, Wyoming agriculture, rural community living, and the livestock-related interests of its members. As part of its mission, WSGA also informs and educates the public regarding the role of the livestock industry in the community, in partnership with the state and federal government. WSGA has approximately 475 members who hold grazing permits from either the Bureau of Land Management or the United States Forest Service, some of whom operate in the national forests in the State of Wyoming. WSGA and its members operate in the geographic area subject to the Crow Tribe Treaty and will be bound and affected by the decision of this Court.

Wyoming Farm Bureau Federation ("WYFB") is a non-profit membership organization founded in 1920 and incorporated under the laws of the State of Wyoming. WYFB represents more than 13,000 members in all 23 counites in the state, including over 2,600 agricultural producers. WYFB's mission is to protect, promote, and represent the economic, social, and educational interests of its members at the local, state, and national levels, as well as to protect private property rights and help its members achieve an equitable return on their investments. WYFB has members who operate in the national forests in the State of Wyoming. WYFB and its members operate in the geographic area subject to the Crow Tribe Treaty and will be bound and affected by the decision of this Court.

Wyoming Wool Growers Association ("WWGA") is a non-profit membership organization founded in 1903 and incorporated under the laws of the State of Wyoming. WWGA represents over 300 members across the state, and works to protect, preserve, and enhance the lamb and wool industry and the ranching community. As part of its mission, WWGA is an active partner with the state, its citizens, and the federal government in caring for, enhancing, and adding value to the renewable resources in the state. WWGA has members who operate in the national forests in the State of Wyoming. WWGA and its members operate in the geographic area subject to the Crow Tribe Treaty and will be bound and affected by the decision of this Court.

Montana Farm Bureau Federation ("MTFB") is a non-profit membership organization founded in 1919 and incorporated under the laws of the State of Montana. MTFB represents over 21,000 member-families in the state and works to enhance both the reputation and the viability of the agricultural industry. MTFB's mission is to promote, protect, and represent the economic, social, and educational interests of its farmer and rancher members. MTFB has members who operate in the national forests in the State of Montana. MTFB and its members operate in the geographic area subject to the Crow Tribe Treaty and will be bound and affected by the decision of this Court.

II. *AMICI CURIAE* IN GEOGRAPHIC AREAS SUBJECT TO INDIAN TREATIES WITH IDENTICAL LANGUAGE AS THE CROW TRIBE TREATY

Idaho Farm Bureau Federation ("IDFB") is a non-profit membership organization founded in 1939 and incorporated under the laws of the State of Idaho. IDFB represents over 80,000 member-families, who farm and ranch in all 44 counties within the state. IDFB's mission is to strengthen agriculture locally and to protect the rights, values, and property of its members and all producers in the state. IDFB works at a local, county, state, and national level to analyze problems and formulate action to achieve educational improvement, economic opportunity, and social advancement. IDFB has members who operate in the national forests in the State of Idaho. IDFB and its members operate in the geographic area subject to the

Bannock and Eastern Shoshone Tribe Treaty, which, while not directly at issue in this case, provides those tribes with an identical hunting right to that contained in the Crow Tribe Treaty.[2] Any decision of this Court may be applied to the Bannock and Eastern Shoshone Tribe Treaty, which will directly affect IDFB and its members.

Utah Farm Bureau Federation ("UTFB") is a non-profit membership organization founded in 1916 and incorporated under the laws of the State of Utah. UTFB represents over 34,000 members in all 29 counties in the state. UTFB works to support its producer-members through legislative lobbying, leadership development programs, commodity associations, rural health and safety programs, insurance products, and agricultural supplies and marketing. UTFB actively works at the local, state, national, and international level to represent the interests of its members and the agricultural industry. UTFB has members who operate in the national forests in the State of Utah. UTFB and its members operate in the geographic area subject to the

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[2] "Article 4 – The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; *but they shall have the right to hunt on the unoccupied lands of the United States* so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts." *Treaty with the Eastern Band Shoshoni and Bannock, 1868*, July 3, 1868, 15 Stat. 673 (emphasis added) ("Bannock and Eastern Shoshone Tribe Treaty").

Navajo Tribe Treaty, which, while not directly at issue in this case, provides the Navajo Tribe with a nearly identical hunting right as contained in the Crow Tribe Treaty.[3] Any decision of this Court may be applied to the Navajo Tribe Treaty, which will directly affect UTFB and its members.

III. *AMICI CURIAE* IN GEOGRAPHIC AREAS SUBJECT TO INDIAN TREATIES WITH HUNTING RIGHTS SIMILAR TO THE CROW TRIBE TREATY

Colorado Farm Bureau Federation ("COFB") is a non-profit membership organization founded in 1919 and incorporated under the laws of the State of Colorado. COFB represents nearly 25,000 members in all 64 counties in the state. COFB's mission is to preserve and protect the future of agriculture and rural values and to protect the Colorado way of life. COFB represents its members' interests in areas such as property rights, water rights, use of public lands, the environment, and education. COFB has members who operate in the national forests in the State of Colorado. COFB and its members operate in the

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[3] "Article 9 – In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, *but retain the right to hunt on any unoccupied lands contiguous to their reservation*, so long as the large game may range thereon in such numbers as to justify the chase . . .." *Treaty with the Navaho* [sic], *1868*, June 1, 1868, 15 Stat. 667 (emphasis added) ("Navajo Tribe Treaty").

geographic area subject to the Ute Tribe Treaty, which, while not directly at issue in this case, provides the Ute Tribe with a tribal hunting right.[4] Any decision of this Court may be applied to the Ute Tribe Treaty, which would directly affect COFB and its members.

South Dakota Cattlemen's Association ("SDCA") is a non-profit membership organization founded in 1948 and incorporated under the laws of the State of South Dakota. SDCA represents over 800 members across the state. SDCA is a producer-oriented organization that is actively involved advocating for its members' interests in agricultural policy, property rights, environmental management, and federal land use at a local, state, and national level. SDCA has members who operate in the Black Hills National Forest in South Dakota. SDCA and its members operate in the geographic area subject to the Sioux Treaty of 1868, which, while not directly at issue in this case, provides various Sioux Tribes, including the Oglala Lakota Tribe, with a tribal hunting right.[5] Any

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[4] "Article 2 – The United States shall permit the Ute Indians to hunt upon [the ceded] lands so long as the game lasts and the Indians are at peace with the white people." *Treaty with the Ute, 1874*, Apr. 29, 1874, 18 Stat. 36 ("Ute Tribe Treaty").

[5] "Article 11 – In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase." *Treaty with the Sioux - - Brule,*

decision of this Court may be applied to the Sioux Treaty of 1868, which would directly affect SDCA and its members.

STATEMENT OF THE CASE

I. HISTORICAL BACKGROUND

In May 1868, the United States and the Crow Tribe of Indians ("Crow Tribe") entered into the Second Treaty of Fort Laramie, which was ratified by the Senate and signed by President Andrew Johnson on May 7, 1868. *Treaty Between the United States and the Crow Tribe of Indians*, May 7, 1868, 15 Stat. 649 ("Crow Tribe Treaty"). The Crow Tribe Treaty resulted in the creation of the Crow Reservation, located in present-day southern Montana, and the tribe's sale of the remainder of its historical territory, which had been partially established by the First Treaty of Fort Laramie, to the United States.[6] *First*

Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee - - and Arapaho, 1868, Apr. 29, 1868, 15 Stat. 635 ("Sioux Treaty of 1868").

[6] "The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth." *First Treaty of Fort Laramie*, Sept. 17, 1851, 11 Stat. 749, Art. 5.

Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749. Pursuant to treaty negotiations, the Crow Tribe Treaty provided that the Crow Tribe "shall have the right to hunt on the *unoccupied* lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Crow Tribe Treaty, Art. 4 (emphasis added).[7]

II. FACTUAL BACKGROUND

In January 2014, Petitioner Clayvin Herrera, an enrolled member of the Crow Tribe who resides on the Crow Reservation in Montana, went on an elk hunt with a group of other enrolled tribe members. Pet. Br. 1, 13. The group tracked a heard of elk off of the Crow Reservation and crossed the Wyoming state line, entering into the Bighorn National Forest. *Id.* When entering the Bighorn National Forest, the hunting group crossed a fence that is maintained by a federal permit holder and crossed lands that are subject to a grazing permit possessed by the same, independent third-party. Pet. App. 5; JA 54, 68–70, 74–75. The group "shot, quartered, and packed" "three elk" out of the Bighorn National Forest and brought the harvest back to their residences on the Crow Reservation in

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[7] "Article 4 – The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Crow Tribe Treaty, Art. 4.

Montana. JA 256. Upon learning of and connecting Herrera to the hunt, Wyoming authorities cited Herrera for two criminal misdemeanors under Wyoming law: (1) taking an antlered big game animal without a license or during a closed season; and (2) being an accessory to the same. Pet. App. 5, 36; JA 117, 165.

III. PROCEDURAL HISTORY

After being formally charged, Herrera moved to dismiss the charges based on the Crow Tribe Treaty provision, contained in Article 4, which he claimed granted him the right, as a registered Crow Tribe member, to hunt in the Bighorn National Forest. Pet. App. 6; Crow Tribe Treaty, Art. 4.

The State of Wyoming opposed, relying in part on the cases *Ward v. Race Horse*, 163 U.S. 504 (1896), and *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995). Pet. App. 37–39. In *Race Horse*, this Court held that Wyoming's admission into the Union "on equal terms with the other states" abrogated the Bannock Indian Tribe's treaty hunting rights and that Wyoming's statehood terminated what the Court deemed a "temporary and precarious," rather than a "perpetual" hunting right. 163 U.S. at 508–15. The Bannock Indian Tribe's treaty hunting right is based on identical language to that used in the Crow Tribe Treaty. *See* Bannock and Eastern Shoshone Tribe Treaty, Art. 4. In *Repsis*, the Tenth Circuit, following *Race Horse*, held that the "Tribe's right to hunt reserved in [the Crow Tribe Treaty was] repealed by the act admitting Wyoming into the Union." 73 F.3d

at 992. The Tenth Circuit also indicated in an "alternative basis for affirmance" that the Crow Tribe's hunting rights were abrogated by the establishment of the Bighorn National Forest because when "Congress created the Big Horn National Forest," the land therein was "no longer available for settlement," thereby "result[ing] in the 'occupation' of the land." *Id.* at 993. According to the Tenth Circuit, the Bighorn National Forest "ha[s] been 'occupied' since the creation of the national forest in 1887 [sic]." *Id.* at 994. This Court declined to grant certiorari in *Repsis*. 116 S.Ct. 1851 (1996) (mem.).

Herrera, in response, argues that *Race Horse* and *Repsis* are no longer good law, as this Court, in 1999, held that the principal theory upon which *Race Horse* rested was no longer binding precedent. Pet. App. 39–41; *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204–07 (1999). Herrera argues that "[t]he Court also rejected *Race Horse*'s 'temporary and precarious' language as 'too broad to be useful in distinguishing rights that survive statehood from those that do not,' explaining that rights reserved in Indian treaties should continue in force unless a terminating event defined in the treaty has occurred." Pet. Br. 13 (*citing Mille Lacs*, 526 U.S. at 206-07). Finally, Herrera cites to the dissent in *Mille Lacs* to support the proposition that "[t]reaty rights are not impliedly terminated upon statehood." Pet. Br. 13 (*citing Mille Lacs*, 526 U.S. at 207 and *Mille Lacs*, 526 U.S. at 219 (Rehnquist, C.J., dissenting)).

Here, the Wyoming State Circuit Court followed *Repsis* in both holdings and denied Herrera's motion

to dismiss the charges brought against him by the State of Wyoming. Pet. App. 3–35; 36–43. Herrera was convicted on both counts. Pet. App. 9. The Wyoming District Court affirmed the Circuit Court and the Wyoming Supreme Court denied Herrera's petition for a writ of review. Pet. App. 3–35; 1–2.

SUMMARY OF THE ARGUMENT

The arguments presented by Herrera and *amicus curiae* the United States overlook those people who regularly use and work on federally managed lands. Federal permit and lease holders, such as ranchers and farmers, enter into an agreement with the federal government in order to graze livestock on vast swaths of federally managed lands, including lands located in today's many national forests. *Amici curiae* request that this Court recognize that those permitted and leased lands are occupied by the permittees and lessees who are regularly present on those lands and who work, use, and exercise a level of control over those lands. The Crow Tribe's treaty hunting rights, whether applicable in Wyoming or in the Big Horn National Forest, do not apply to federally permitted and leased lands.

The term "unoccupied," as used in the Crow Tribe Treaty, has a clear and unambiguous meaning. To occupy means to take up space; to reside in, as an owner or tenant; or to hold in possession. This understanding of the term "occupy" has not varied in over a century. Federal permit and lease holders,

such as those represented by *amici curiae*, occupy the federally managed lands for which they have permits and leases. Federal permit and lease holders are physically present on the lands subject to their agreements, have possession of those lands, and exercise a level of control over them. Federal permits and leaseholds are, therefore, not "unoccupied" as contemplated in the Crow Tribe Treaty.

Furthermore, the plain meaning of the term "occupy" was the same when the Crow Tribe Treaty was written and ratified as it is today. Courts and legal dictionaries throughout the late nineteenth and early twentieth centuries recognized that "occupy" included possessing, holding or keeping for use, exercising control over, and putting property to a use appropriate to its general character. Federal permit and lease holders not only exert a level of possession and control over these lands, but also quite clearly put them to a use that is appropriate to the lands' character, such as grazing.

Finally, even if this Court decides to examine the subjective intent of the parties behind the hunting rights contained in the Crow Tribe Treaty, the intent was to limit conflict between the Crow Tribe members and settlers moving West, as asserted by the United States in its brief. U.S. Br. 25. That intent encompasses a limitation on tribal members' hunting rights on lands regularly and legally maintained and worked—occupied—by settlers, such as the settlers' grazing and farming lands. Petitioner and the United States both affirmatively acknowledge that farm lands were considered occupied in the time

contemporaneous to signing the Crow Tribe Treaty. Pet. Br. 35; U.S. Br. 26. Those lands are nearly identical to the current federally permitted and leased lands occupied by *amici curiae's* members.

Practically speaking, if this Court were to allow for an unfettered tribal hunting right on lands subject to legal use and possession by permits or leases, instead of limiting the hunting rights to all "unoccupied" lands of the United States, ranchers and farmers would be forced to contend with out-of-season, unmanaged, tribal hunting on their federal allotments, potentially endangering the ranchers' and farmers' operations, livestock, their own personal safety, and the safety of those out-of-season Indian hunters. If out-of-season and unlicensed hunting were allowed, the ranchers and farmers would have no way of knowing when the hunting will occur on their leased or permitted lands, would have no ability to prepare for those hunts, and may be unexpectedly confronted with armed persons on their permit and leaseholds. In addition, this Court's holding could then easily be applied to a number of different Indian tribe treaties that contain identical language to the Crow Tribe Treaty, including, but not limited to: the Bannock and Eastern Shoshone Tribe Treaty and the Navajo Tribe Treaty. Further, there are a number of Indian treaties that, while containing slightly different language, could be analogized to the Crow Tribe Treaty in this matter, including, but not limited to: the Sioux Treaty of 1868 and the Ute Tribe Treaty. *Amici curiae* wish to make the Court acutely aware

that any decision in this case will almost certainly not be limited to the Crow Tribe Treaty.[8]

ARGUMENT

In order to determine the bounds of the hunting right granted to the Crow Tribe in the Crow Tribe Treaty, this Court must first look to the plain meaning of the words used. If—and only if—the language is ambiguous, should the Court then look to evidence surrounding the execution of and intent behind the treaty:

> All agree that as a general rule in the interpretation of written instruments the intention of the parties must control, and that such intention is to be gathered from the words used—the words being interpreted, not literally nor loosely, but according to their ordinary signification. If the words be clear and explicit, leaving no room to doubt what the parties intended, they must be interpreted according to their natural and ordinary significance. If the words are ambiguous, then resort may be

[8] Not only could any opinion in this case be applied to the numerous Indian treaties in the West, which confer identical or similar hunting rights, this Court, in *Seufert Bros. Co. v. United States*, has already held that rights conferred upon a tribe under a treaty apply beyond the historically ceded territory of the tribe in question. 249 U.S. 194 (1919). Thus, the definition of "unoccupied" will extend to smaller tracts of federally managed lands throughout the United States.

> had to such evidence, written or oral, as will disclose the circumstances attending the execution of the instrument and place the court in the situation in which the parties stood when they signed the writing to be interpreted.

United States v. Choctaw Nation, 179 U.S. 494, 531 (1900) (on interpretation of the agreement entered into between the United States and the Wichita and Affiliated Bands of Indians).

I. THE PLAIN LANGUAGE OF THE CROW TRIBE TREATY DOES NOT PROVIDE TRIBE MEMBERS A RIGHT TO HUNT ON FEDERALLY PERMITTED OR LEASED LANDS BECAUSE THEY ARE NOT "UNOCCUPIED"

The plain meaning of the term "unoccupied" in the Crow Tribe Treaty does not allow Crow Tribe members to hunt on federally managed lands that have been permitted or leased to private parties, given that those lands are occupied by the federal permit and lease holders.

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (*citing United States v. First Nat. Bank*, 234 U.S. 245,

258 (1914); *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 409 (1914); *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 33 (1895); *Lake County v. Rollins*, 130 U.S. 662, 670, 671 (1889)). The same is true of Indian treaties. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (rejecting other canons of interpretation when the plain meaning of the treaty was clear); *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945) ("We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices."); *Jones v. United States*, 846 F.3d 1343, 1352 (Fed. Cir. 2017) ("The Treaty was written in English, however, and we must honor any unambiguous language in the treaty."). This Court does not have any additional duty of interpretation when the language of a treaty is "plain and admits of no more than one meaning." *Caminetti*, 242 U.S. at 485 (*citing Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899)); *see Chickasaw Nation*, 534 U.S. at 94; *Choctaw Nation*, 179 U.S. at 531.

The word "occupy," as defined by MERRIAM-WEBSTER means: "to take up (a place or extent in space)" or "to reside in as an owner or tenant." *Occupy*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/occupy (last visited Nov. 18, 2018). BLACK'S LAW DICTIONARY defines "occupy" as: "To hold possession of; to be in actual possession of." *Occupy*, BLACK'S LAW DICTIONARY (10th ed. 2014). Additionally, BLACK'S LAW DICTIONARY defines "unoccupied" as "(Of a building) not occupied; vacant." *Unoccupied*, BLACK'S LAW DICTIONARY (10th ed. 2014).

This plain meaning of the term "occupy" has not varied in over a century. The first BLACK'S LAW DICTIONARY, published in 1891, defined "occupy" as: "To hold in possession; to hold or keep for use." *Occupy*, BLACK'S LAW DICTIONARY (1st ed. 1891). ANDERSON'S DICTIONARY OF LAW, published in 1889, defined "occupy" as: "To hold in possession; to hold or keep for use," and further explained that occupy "[i]mplies actual use, possession or cultivation by a particular person." *Occupy*, ANDERSON'S DICTIONARY OF LAW (1st ed. 1889).

While the definition of "possession" may be less obvious, MERRIAM-WEBSTER, in relevant part, defines the term as: "the act of having or taking into control," "control or occupancy of property without regard to ownership," or "something owned, occupied, or controlled." *Possession*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/possession (last visited Nov. 18, 2018). BLACK'S LAW DICTIONARY defines the term as: "The fact of having or holding property in one's power; the exercise of dominion over property." *Possession*, BLACK'S LAW DICTIONARY (10th ed. 2014). Additionally, dating back to the nineteenth century, "[i]n common speech a man is said to possess or be in possession of anything of which he has the apparent control." *Id.* (*citing* FREDERICK POLLOCK & ROBERT SAMUEL WRIGHT, AN ESSAY ON POSSESSION IN THE COMMON LAW 1–2 (1888)). Further, land that is lawfully possessed by a party not holding title is considered derivatively possessed. *Possession*, BLACK'S LAW DICTIONARY (10th ed. 2014).

All of these definitions lead to the understanding that there are certain indices of occupation: presence, possession, use, control (actual or apparent), and cultivation.

The United States Forest Service ("Forest Service") and the Bureau of Land Management ("BLM") administer over 24,500 grazing permits and leases in 16 western states. *BLM and Forest Service Announce 2018 Grazing Fees*, Bureau of Land Management, https://www.blm.gov/press-release/blm-and-forest-service-announce-2018-grazing-fees (last visited Nov. 18, 2018). These lessees and permittees pay for the privilege to graze livestock on federally managed lands, sometimes referred to as "public lands," pursuant to their agreements with the United States. *See* App. A. The grazing lands are considered to be part of the permit, and the lessee or permittee is responsible for managing, protecting, and improving (when necessary) the lands subject to the permit, in conjunction with the Forest Service or BLM and its authorized officer. *See id.* The Forest Service defines a grazing permit as "a document authorizing livestock to use [National Forest Service] lands or other lands under Forest Service control for livestock production." Forest Service Manual 2200, *et seq.*, at 2230.5, https://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsm?2200 (last visited Nov. 18, 2018) ("FSM 2200"). Permits can be cancelled for non-use. *Id.* at 2231.62a. When calculating the grazing fees for a grazing permit, the Forest Service bases the calculation off of a "head month," which is "a month's *use and occupancy* of range by one weaned or adult cow with or without calf, bull, steer, heifer, horse,

burro, or mule, or 5 sheep or goats." *Id.* at 2230.5 (emphasis added).

Essentially, federal permit and lease holders have provided consideration for and entered into an agreement with the United States to graze their livestock on specific portions of federally managed lands. In turn, the permit and lease holders have the right to be present on, use, cultivate, and exert a level of control over those lands.[9] This is a partnership between the United States and the lessee or permittee, both of whom benefit from the relationship. Lessees and permittees receive the benefit of operating on federally managed lands and the Forest Service and BLM use the lessees and permittees to maintain the land and to achieve the "resource management objectives" and "to best serve the public's long-term economic and social needs." *E.g.*, FSM 2200, at 2230.2.

Under the plain meaning of "unoccupied," federally permitted and leased lands are occupied by the private parties who possess those permits and leases. The Forest Service acknowledges, in its own manual, that permittees use the permitted lands and that permittees' livestock occupy the lands. *See* FSM 2200, at 2230.5. The permit holders have the right to hold, use, control, cultivate, and operate upon those lands. Indeed, the Forest Service's agent in this case testified that the fence Petitioner crossed at the

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[9] This right is subject to the terms and conditions outlined in the specific permit or lease. Additionally, the right is subject to termination by the authorizing agency, as described in the permit or lease. *See*, App. A.

Wyoming state line was maintained by the federal permit holder who held the grazing permit to those lands. JA 75, 131. While the leases and permits may be subject to some conditions, the federal government grants lessees and permittees the right to put those lands to use, and to exert a level of control over those lands, and in turn, expects them to maintain and protect those lands for the benefit of the United States.

Some form of extraordinary evidence would be required to demonstrate that another, differing or conflicting meaning of the term "occupy" exists or has existed in over a century. *See Northwestern Bands of Shoshone Indians*, 324 U.S. at 353; *Chickasaw*, 534 U.S. at 94; *Jones*, 846 F.3d at 1352. When the plain meaning is apparent, this Court should not differ from that meaning. *Id.* Federal lessees and permittees exhibit all of the indices of occupation, as understood by lawyers and laypersons alike, of their leased and permitted lands. The Court's holding in this matter, therefore, should not allow tribal hunting on federal permit and leaseholds pursuant to the Crow Tribe Treaty.

II. THE CONTEMPORANEOUS MEANING OF "UNOCCUPIED" DEMONSTRATES THAT FEDERALLY PERMITTED AND LEASED LANDS ARE INHERENTLY OCCUPIED

The historical understanding of the word "[]occupied," as used in the Crow Tribe Treaty—as in other contemporaneous uses—contemplated

occupation by possession, control, and/or use, not simply a perpetual, physical presence.

"When congress used the word 'occupied,' it could have meant no more than possession of the country." *United States v. Rogers*, 23 F. 658, 666 (W.D. Ark. 1885). The BLACK'S LAW DICTIONARY definition of "occupy," is, in part, based on this Court's 1883 decision in *Missionary Soc. of M.E. Church v. Dalles City*, which states "[t]o occupy means to hold in possession; to hold or keep for use." 107 U.S. 336 (1883); *see also Occupy*, BLACK'S LAW DICTIONARY (10th ed. 2014). A variety of courts in the late nineteenth and early twentieth centuries understood the term "occupied" to include property that is "subject[] to the will and control" of a party or "put to a use appropriate to its general character." *Horton v. Moore*, 38 Cal. App. 623, 628 (2nd Dist. 1918) ("It is also held that the terms 'occupation,' 'possession pedis,' 'subjection to the will and control,' are synonymous; that property is possessed and occupied when it is put to a use appropriate to its general character.") (*citing Andrus v. Smith*, 133 Cal. 78 (1901); *Webber v. Clarke*, 74 Cal. 11 (1887); *Rogers*, 23 F. 658 (W.D. Ark. 1885); *Lawrence v. Fulton*, 19 Cal. 683 (1862)); *see Bailey v. Irby*, 2 Nott & McC. 343, 345 (S.C. Const. App. 1820) (equating "actual occupancy" with "possession," and "a *pedia possessio*"); *accord Jackson ex dem. Gilliland v. Woodrudd*, 1 Cow. 276 (N.Y. Sup. Ct. 1823); *see also Territory v. Stone*, 2 Dakota 155, 4 N.W. 697 (1880) (equating the words 'occupy' and 'use'). This understanding of "occupy" even extended, specifically, to lands that were used for

cultivation and grazing. *Collier v. Bartlett*, 175 P. 247, 248 (Okla. 1918).

Particularly important to this Court's inquiry, are a number of state court opinions interpreting Indian treaty rights. These courts long understood "occupied lands" to include, among other things, lands used for subsistence—including agricultural activities. *See State v. Coffee*, 97 Idaho 905, 907 (1976) ("The area occupied by the Idaho Kootenai was used primarily for residence and subsistence. The tribe gained sustenance mainly from fishing, although hunting, berry picking, trapping and root digging were also impotant [*sic*].") Further, when analyzing the language granting the Nez Perce Tribe the right to hunt on "open and unclaimed land," the Idaho Supreme Court stated the phrase "was intended to include and embrace such lands as were not settled and occupied by the whites under possessory rights or patent or otherwise appropriated to private ownership." *State v. Arthur*, 74 Idaho 251, 256 (1953).

This Court, when examining the treaty between the United States and Yakima Tribe, stated "the object of the treaty was to limit the *occupancy* [of the Indian tribe] to certain lands, and to define rights outside of them." *United States v. Winans*, 198 U.S. 371, 379 (1905). While it was clear that the tribe would settle and reside on a portion of the land, this Court reasoned that the entirety of the land reserved for the tribe, which the tribe exercised a particular level of control over, was thereby occupied by the tribe in its entirety. *Id.* at 379, 381. Justice Brown, in his dissent from the Court's majority opinion in *Race*

Horse, understood that "the words 'unoccupied lands of the United States' [] refer, not only to lands which have not been patented, but also to those [lands] which have not been settled upon [or] fenced . . .." *Race Horse*, 163 U.S. at 520. As this Court has previously recognized, the Court should refrain from interpreting a treaty against its plain meaning, especially when the historical context weighs against that interpretation. *Id.* at 516. ("Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language, and in conflict with an act of congress, and also destructive of the rights of one of the states.")

Federal permittees and lessees are required to take responsibility for the use and maintenance of the land they graze. Their permits require them to actually use the land. *See* FSM 2200, at 2231.62a. Their permits require them to put the lands to a beneficial use that is appropriate to the land's character—namely, grazing. *See, e.g.*, FSM 2200, at 2230.3, 2231.02, 2231.03. They fence and maintain the property subject to their permits. *See* JA 54, 68–70, 74–75; *see also* App. A.[10] This does not differ from

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[10] While the United States is not required to fence federally managed lands in compliance with state "fence laws," *see Light v. United States*, 220 U.S. 523, 534–537 (1911), many federal permits are conditioned on the maintenance or construction of fencing to contain grazing to the permitted area and prevent livestock from entering non-permitted areas. *See* 43 U.S.C.

lands that were grazed by settlers in the nineteenth century, with the exception that the lands today are much more clearly demarcated, because they are legally required to be under the federal permit and leasing system. *See* FSM 2200, at 2231.2, *et seq.* Federally managed lands, in their entirety, are much more clearly denoted on maps than they were in 1868. *See, e.g. Federal Lands and Indian Reservations*, USGS, https://nationalmap.gov/small_scale/printable/fedlands.html (last visited Nov. 18, 2018). In addition, federal permits and leases are required to give specific definitions of their borders, including maps which are attached to those permits. *See* App. A. If anything, lands that are occupied by federal permit holders are much more obvious and apparent today than the lands used for grazing by settlers in 1868.

Additionally, "[t]o have possession does not require actual residence." *Rogers*, 23 F. at 666. Even though federal permit holders do not live on the federally managed lands in question, that does not mean those lands are not occupied—as courts have made clear for decades. *See Winans*, 198 U.S. at 379,

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§ 315c ("Fences . . . and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary."); *see also Western Watershed Project v BLM*, No. 10-cv-266-S, 2011 WL 13135784, at *3 (D. Wyo. Dec. 14, 2011) (evidencing BLM's offer of a ten year grazing permit conditioned on maintenance of existing fences); *Johnson v. Almida Land & Cattle Company, LLC*, 241 P.3d 673 (Ariz. 2016) (evidencing a Forest Service grazing permit in the Prescott National Forest requiring the permitholder to erect a fence).

381; *Race Horse*, 163 U.S. at 520; *Coffee*, 97 Idaho at 907; *Horton*, 38 Cal. App. at 628; *Collier*, 175 P. at 248. While permit and lease holders do not reside on the permitted lands, they certainly exercise a level of control over the lands in question. *See* App. A; *see also* FSM 2200, at 2231. Permit and lease holders are required to abide by the terms of their agreement with the United States, but that agreement grants them very specific interests in the permitted lands. These interests include the right to access the land, the right to be present on the land, the right to hold the land as separate from surrounding lands (including other permitted lands), and most importantly, the right to put the land to a used that is appropriate to its general character. *See* App. A; *see also* FSM 2200, at 2231. In every contemporaneous understanding of the word "unoccupied," it is clear that permit and lease holders occupy their permitted and leased federal lands.

The meaning of "unoccupied," as used in the Crow Tribe Treaty, does not include federally managed lands that are occupied by federal permit and leaseholders. Those permittees and lessees not only exhibit the indices of occupation, as we understand them today, but as they were understood dating back to the time of the signing and ratification of the Crow Tribe Treaty. Federal permit and leaseholders are not only physically present on the land and have their livestock physically present on the land, but also the permitted and leased lands are subject to a level of control by their permittees and lessees, are put to a beneficial use appropriate to their general character, and are more clearly demarcated than they would have been 150 years ago. Federally

permitted and leased lands are not "unoccupied" as that term was meant by the Crow Tribe Treaty.

III. THE INTENT BEHIND THE CROW TRIBE TREATY ALSO SUPPORTS THE UNDERSTANDING THAT FEDERALLY PERMITTED AND LEASED LANDS ARE NOT "UNOCCUPIED"

Even if this Court goes beyond the plain meaning and looks to the intent behind the Crow Tribe Treaty, the overwhelming evidence indicates that the intent was to reduce conflict between the Indian tribes and the settlers moving West. Accordingly, federally permitted and leased lands should not be considered "unoccupied" since farming and grazing lands, which were possessed, held, and used by early settlers just as they are possessed, held, and used by federal permit and lease holders today, would have been seen as high-conflict areas.

Importantly, it is highly likely that the Crow Tribe knew that the term "unoccupied" would apply to lands that were regularly possessed, held, and used by settlers for agricultural purposes. First, the tribe understood that the term "occupied" encompassed lands that were possessed, used, and controlled by a person, not just settled by residence. "Under the [Shoshone-Bannock] treaty a relatively few Indians were to 'occupy' millions of acres of land within the meaning of the treaty, which suggests that the signatory Indians' understanding would not necessarily require actual physical presence or use to change land from an "unoccupied" to an occupied

status." *State v. Cutler*, 708 P.2d 853, 857 (Idaho 1985). The same is true of the Crow Tribe Treaty in this matter. The Crow Tribe Reservation established in the Crow Tribe Treaty comprised of about eight million acres. FREDERICK E. HOXIE, PARADING THROUGH HISTORY: THE MAKING OF THE CROW NATION IN AMERICA, 1805-1935 92 (Cambridge, 1995). No matter the size of the Crow Tribe in 1868, nowhere near every acre would be physically settled by tribe members, yet the entire reservation was "occupied." Crow Tribe Treaty, Art. 2 (the Crow Tribe Reservation is "set apart for the absolute and undisturbed use and *occupation* of the Indians herein named." (emphasis added)). Second, the United States explicitly informed the Crow Tribe that its hunting right would not apply on agricultural lands, which Petitioner acknowledges. Pet. Br. 35. In 1873, when discussing the treaty, a representative of the United States told the Crow Tribe that the tribe members were allowed to hunt on the lands "as long as there are any buffalo, and as long as the white men are not here . . . *with farms*." Pet. Br. 35; U.S. Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1873*, at 132 (1874). There was no misunderstanding—agricultural lands were occupied by the settlers.

Similarly, if, as the United States argues in its brief, the intent behind the Crow Tribe Treaty, from its perspective, was to reduce conflict between the Indian tribes and the settlers moving West, U.S. Br. 25–26, then the term "unoccupied" should be understood to prohibit hunting on agricultural lands where settlers were often present and where they had

showed occupation by using, maintaining, and often fencing or otherwise demarcating those lands. *See supra*, Argument, Sections I & II; *see, e.g.*, *Buford v. Houtz*, 133 U.S. 320, 328 (1890) ("Nearly all states in early days had what was called the 'Fence Law,'-a law by which a kind of fence, sufficient in a general way to protect the cultivated ground from cattle and other domestic animals . . . was prescribed."). First, this interpretation is supported by the definition of "occupy" applied by courts through the end of the nineteenth and the beginning of the twentieth centuries, as demonstrated above. *See supra*, Argument, Section II. Second, like Petitioner, the United States acknowledges that agricultural lands were not considered "unoccupied" at the time contemporaneous with ratification. U.S. Br. 26 (*citing* U.S. Office of Indian Affairs, *Annual Report* at 132).

As understood by both the Crow Tribe and the United States, lands used for agricultural activities were explicitly excluded from the Crow Tribe's treaty hunting right, because they are inherently occupied. If the purpose of the term "unoccupied" was to keep the tribes and the settlers from coming into conflict, that conflict would not only occur where the settlers resided, but also in any areas that were regularly and consistently occupied by settlers, like their agricultural lands. *See* Crow Tribe Treaty, Art. 4; U.S. Br. 25. The West, as we know it today, was founded on a robust and prosperous agricultural trade. *See* ALEXANDER MAJORS, SEVENTY YEARS ON THE FRONTIER: ALEXANDER MAJORS' MEMOIRS OF A LIFETIME ON THE BORDER 224 (Rand, McNally, 1893) ("Cattle-raising on the rich, nutritious bunch grass of

the broad valleys of the Territory also soon grew to be a very lucrative business, to supply the numerous placer-mining towns of Montana."); CHRISTOPHER KNOWITON, CATTLE KINGDOM: THE HIDDEN HISTORY OF THE COWBOY WEST 118 (Houghton Mifflin Harcourt 2017) ("Wyoming was all about cattle. . . Fortuitously located at the center of the open range, with Colorado Kansas, and Nebraska to the south and the Montana and Dakota territories to the north, Cheyenne was ideally situated for shipping cattle east by rail."). Both the Crow Tribe and the United States recognized that when settlers moved West and established settlements, they would also establish agricultural operations, and those lands would then be considered "occupied."

The permittees and lessees of today operate more transparently and under more regulation than the ranchers and farmers of the Old West. *See* App. A; *see generally* FSM 2200. Not only that, the lands they occupy are specifically permitted or leased from the federal government and must be explicitly defined by a map. *See* App. A. Both the Crow Tribe and the United States understood that agricultural lands, like those of federal permitted and leased lands, were occupied by those who used, cultivated, and maintained the lands.

In addition to its historic interpretation, the United States also acknowledges that certain lands in today's national forests are "occupied" because they are put to a beneficial use by the United States or its people. U.S. Br. 28 ("[T]he U.S. Forest Service may construct roads, campsites, or administrative

buildings on particular tracts of National Forest land. Where the Forest Service has done so, those areas may be considered occupied under the 1868 Treaty. . ..."). The United States asserts that the federal government can administer "a particular tract of National Forest land in such a way that render that land occupied within the meaning of the 1868 Treaty." U.S. Br. 28 (*citing Cutler*, 708 P.2d at 856). The tracts that are occupied, are "those that the signatory Indians to treaties would have understood [] to be claimed, settled or occupied." *Cutler*, 708 P.2d at 856; U.S. Br. 28. Essentially, by administering a tract in such a way that would potentially have people present, that tract becomes "occupied." The United States offers, as corroborating evidence, 36 C.F.R. 261.10(d)(1), which prohibits discharging a firearm "within 150 yards of a residence, building, campsite, developed recreation sit *or occupied area*." U.S. Br. 2[illegible] (emphasis added). By its plain language, the regulation indicates there is occupation beyond the listed uses in the regulation, when the lands are put to a beneficial use. Much like the intent of "unoccupied" as used in the Crow Tribe Treaty, the intent behind prohibiting the discharge of firearms near "occupied area[s]" is safety.

There can be no argument that lands that regularly have people and livestock present would be of concern when discharging a firearm today or when trying to keep the tribes and settlers separate in the nineteenth century. Federal permit and leaseholders are regularly present on the lands, in order to conduct their agricultural operations. Further, the federal government is the party that designates what lands

can be permitted or leased to private parties. By doing so, the United States is putting those lands to a beneficial use which renders that land occupied under the meaning of the Crow Tribe Treaty. *See* U.S. Br. 28; *see also Cutler*, 708 P.2d at 856. Federally permitted and leased lands both, regularly have people present and are designated by the United States for a beneficial use, fulfilling both of the United States' established criteria for occupation of land within the national forests.

Even when interpreting the intent behind the Crow Tribe Treaty, federally permitted and leased lands are not "unoccupied" as was understood and intended by both parties signing the Crow Tribe Treaty.

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The holding in this case should not reduce the meaning of the word "unoccupied" in the Crow Tribe Treaty. The plain meaning of "occupied," along with the meaning contemporaneous to the signing and ratification of the Crow Tribe Treaty, indicates that lands where people are regularly present, and lands that are possessed, held, and used, are occupied. Federal permit and leaseholds exhibit all of these indices of occupation. Even looking to the intent and understanding of the parties over a century ago, it is evident that both the Crow Tribe and the United States understood grazing lands were occupied by the settlers moving West, using those lands to support their newly formed settlements. The United States intended to reduce conflict between the tribes and

settlers moving West, and intentionally excluded tribal hunting, not only from the lands where the settlers lived, but also from where the settlers were regularly present, exercised a particular control over the land, and worked the land for a beneficial purpose.

CONCLUSION

Regardless of if this Court determines that the Crow Tribe's hunting rights survived Wyoming's admission into the Union or whether the creation of the Big Horn National Forest abrogates those rights, *amici curiae* request that this Court make clear that federally managed lands that are leased or permitted to private parties are not subject to an Indian treaty hunting right that only exists on the "unoccupied lands of the United States."

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